101st Congress
1st Session

SENATE

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101-22

PROCEEDINGS OF THE UNITED STATES SENATE

IN THE

IMPEACHMENT TRIAL OF WALTER L. NIXON, JR., A JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

November 13, 1989.—Ordered to be printed

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On the Articles Against Judge Walter L. Nixon, Jr.

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FOREWORD

This volume completes the printing of the Senate's proceedings in the impeachment of Walter L. Nixon, Jr., formerly a United States District Judge for the Southern District of Mississippi. It brings together for the future use of the Senate, scholars, and the public those materials that have not been made readily available in other Senate publications. The purpose of this foreword is both to describe the contents of this volume and to identify the other Senate documents published in this impeachment proceeding in order to provide a full understanding of the documentary record.

The House Managers exhibited to the Senate the Articles of Impeachment against Judge Nixon on May 11, 1989, and sent amendments to the articles to the Senate on October 5, 1989, to reflect a correction in the transcript of Judge Nixon's testimony quoted in the articles. The original text of the Articles of Impeachment and the initial proceedings in the Senate upon exhibition of the articles are reprinted in this volume at pages 3–11. The amendment to the articles, Judge Nixon's answer to the amended articles, and the House replication are reprinted at pages 13–23. The original text of the articles and the original answer and replication also appear in Senate Document 101–8, 101st Cong., 1st Sess. (1989), together with the Senate's procedural rules for impeachment proceedings and relevant constitutional provisions. The amended versions of these documents were reprinted, along with the rules and constitutional provisions, in Senate Document 101–17, 101st Cong., 1st Sess. (1989).

On May 11, 1989, the Senate agreed to Senate Resolution 128, which provided for the appointment of an impeachment trial committee to conduct evidentiary proceedings. The Impeachment Trial Committee's proceedings from the consideration of Senate Resolution 128 through the completion of the Committee's evidentiary hearings are reprinted in the multi-volume Report of the Senate Impeachment Trial Committee on the Articles Against Judge Walter L. Nixon, Jr.: Hearings Before the Senate Impeachment Trial Committee, Senate Hearing 101–247, 101st Cong., 1st Sess. (1989).

Part 1 of that hearing report contains the Committee's pretrial proceedings. Part 2 of Senate Hearing 101–247 contains the testimonial record of the Committee's evidentiary hearings, which occupied four days from September 7 through September 13, 1989. Part 3 reproduces the exhibits admitted into evidence at the Committee's hearings. Part 4 reprints evidence that the Committee admitted into its hearing record from the record of prior evidentiary proceedings in this matter. Part 4A, which is two volumes, is the record of Judge Nixon's criminal trial proceeding. Part 4B, in three volumes, is the record of the House impeachment inquiry. Part 4C is a single volume of evidence taken at Judge Nixon's postconviction proceeding in Federal court.

Senate Resolution 128 authorized the Committee to accompany its certified report of its evidentiary proceedings with a neutral summary of the evidence presented. Senate Report 101-164, 101st Cong., 1st Sess. (1989), which the Committee filed with the Senate on October 16, 1989, is the Committee's certification of its record and summary of evidence. Following the completion of the Committee's proceedings, the parties filed briefs before the full Senate. These briefs are reprinted in this final volume at pages 27-355. The Senate heard oral argument on the parties on November 1, deliberated in closed session on November 2, and voted on two motions of Judge Nixon's and on the Articles of Impeachment on November 3, 1989. The oral argument on the Senate floor is reprinted in this volume at pages 361-421, the Senate's votes are reproduced at pages 427-37, and the judgment of conviction appears at page 439. The statements of eight Senators who filed public statements on their votes are printed at pages 443-65.

This impeachment proceeding also generated civil litigation in Federal court. Judge Nixon intervened in an action initiated in district court by Judge Alcee L. Hastings, who was tried and removed from office in the same session of the Senate, in order to challenge the procedures used by the Senate to try his impeachment. Because Judge Nixon's and Judge Hastings' complaints raised a similar legal issue, concerning the Senate's appointment of a committee to conduct evidentiary proceedings, the record of judicial consideration of both judges' claims has been reproduced together in a publication, Senate Document 101-18, 101st Cong., 1st Sess. (1989), which completes the record of the Hastings impeachment. The court papers filed in this litigation appear at pages 835-1293 of that volume. Following his conviction and removal from office, Judge Nixon filed a new lawsuit in district court to renew his challenge to the Senate's procedures. As of the date of this publication, there have been no judicial rulings in this action, and filings from this recently initiated litigation are not included in either Senate Document 101-18 or this volume.

We hope that the publication of this final volume will contribute to an understanding of the Senate's conduct of these impeachment proceedings.

WYCHE FOWLER, JR.,
Chairman.
JOHN C. DANFORTH,
Vice Chairman.

Impeachment Trial Committee on the Articles Against Judge Walter L. Nixon, Jr.

December 1989.

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PRELIMINARY PROCEEDINGS OF THE UNITED STATES SENATE SITTING AS A COURT OF IMPEACHMENT

ARTICLES OF IMPEACHMENT AGAINST JUDGE WALTER L. NIXON, JR., AS EXHIBITED BY THE HOUSE MANAGERS ON MAY 11, 1989

(From the Congressional Record—Senate, May 11, 1989)

The ACTING PRESIDENT pro tempore. The acting majority leader is recognized.

Mr. FOWLER. Mr. President, I ask unanimous consent that the secretary inform the House of Representatives that the Senate is ready to receive the managers appointed by the House for the purpose of exhibiting articles of impeachment against Walter L. Nixon, Jr., judge of the U.S. District Court for the Southern District of Mississippi, agreeably to the notice communicated to the Senate and at the hour of 11 a.m. on today, Thursday, May 11, 1989, the Senate will receive the honorable managers on the part of the House of Representatives in order that they may present and exhibit the said articles of impeachment against the said Walter L. Nixon, Jr., judge of the U.S. District Court for the Southern District of Mississippi.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. FOWLER. Mr. President, I ask unanimous consent that the following counsel and staff of the House of Representatives and counsel for Judge Nixon be permitted the privileges of the floor during today's proceedings with respect to the trial of the impeachment of Judge Nixon. They are as follows: Daniel Freeman, Alan Baron, Catherine Leroy, William Jones, Peter Keith, Pam Naughton, Coleen Kiko, and David Stewart.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

CALL OF THE ROLL

Mr. FOWLER. Mr. President, I suggest the absence of a quorum. This will be a live quorum. We will, as further stated and under the rule, meet at 11 o'clock for the swearing in of Senators to proceed with the impeachment matter.

The ACTING PRESIDENT pro tempore. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll and the following Senators entered the Chamber and answered to their names:

[Quorum No. 4]

Bryan
Fowler
Metzenbaum
Stevens
Thurmond
Wirth

The ACTING PRESIDENT pro tempore. A quorum is not present. The clerk will call the names of the absent Senators.

The assistant legislative clerk resumed the call of the roll and the following Senators entered the Chamber and answered to their names:

Adams
Baucus
Biden
Bingaman
Boren
Boschwitz
Bradley
Breaux
Bumpers
Burdick
Burns
Byrd
Coats
Cochran
Cohen
Conrad
Cranston
D'Amato
Danforth
Daschle
Dixon
Dodd
Dole
Domenici
Durenberger
Exon
Ford
Garn
Glenn
Gore
Gorton
Graham
Gramm
Grassley
Harkin
Hatch
Hatfield
Heflin
Helms
Hollings
Inouye
Jeffords
Johnston
Kassebaum
Kasten
Kennedy
Kerrey
Kerry
Kohl
Lautenberg
Leahy
Levin
Lieberman
Lott
Lugar
Mack
Matsunaga
McClure
McConnell
Mikulski
Mitchell
Moynihan
Murkowski
Nickles
Nunn
Packwood
Pell
Pressler
Pryor
Reid
Riegle
Robb
Rockefeller
Roth
Rudman
Sanford
Sarbanes
Sasser
Shelby
Simon
Simpson
Specter
Symms
Wallop
Warner
Wilson

The President pro tempore. The Senate will be in order. The staff will take their seats. The Senators wishing to converse will retire to the cloakroom.

A quorum is present.

The secretary of the majority.

The secretary of the majority, C. Abbott Saffold, announced their presence as follows:

Mr. President, I announce the presence of the managers on the part of the House of Representatives to conduct proceedings on behalf of the House concerning the impeachment of Walter L. Nixon, Jr., judge of the U.S. District Court for the Southern District of Mississippi.

The President pro tempore. The managers on the part of the House will be received and assigned to their seats.

(The Sergeant at Arms escorted the managers to the seats assigned to them in the area in front of the Chair.)

The President pro tempore. The Sergeant at Arms will make the proclamation.

The Sergeant at Arms, Henry K. Giugni, made a proclamation, as follows:

Hear ye! Hear ye! Hear ye! All persons are commanded to keep silent, on pain of imprisonment, while the House of Representatives is exhibiting to the Senate of the United States articles of impeachment against Walter L. Nixon, Jr., judge of the U.S. District Court for the Southern District of Mississippi.

The President pro tempore. The managers on the part of the House will proceed.

Mr. Manager Brooks. Mr. President, the managers on the part of the House of Representatives are here present and ready to present the articles of impeachment which have been preferred by the House of Representatives against Walter L. Nixon, Jr., judge of the U.S. District Court for the Southern District of Mississippi. The House adopted the following resolution which, with the permission of the President of the Senate, I will read:

HOUSE RESOLUTION 150, IN THE HOUSE OF REPRESENTATIVES, MAY 10, 1989

VIII. *Resolved,* That Mr. Brooks, Mr. Edwards, Mr. Cardin, Mr. Sensenbrenner, and Mr. Dannemeyer, Members of the House of Representatives, are hereby appointed managers to conduct the impeachment trial against Walter L. Nixon, Jr., judge of the United States District Court for the Southern District of Mississippi. Pursuant to the authorities granted in H. Res. 150 and H. Res. 151, the managers now appear before the Senate of the United States and at the bar thereof in the name of the House of Representatives and of all the people of the United States to try the impeachment of Walter L. Nixon, Jr., of high crimes and misdemeanors in office and to exhibit to the Senate of the United States the articles of impeachment against that judge which have been agreed upon the House of Representatives. These managers hereby demand that the Senate take order for the appearance of Walter L. Nixon, Jr., to answer such impeachment, and demand his conviction and appropriate judgment thereon.

IX. With the permission of the President and the Senate, I will now read the articles of impeachment.

HOUSE RESOLUTION 87, IN THE HOUSE OF REPRESENTATIVES, MAY 10, 1989

X. *Resolved,* That Walter L. Nixon, Jr., a judge of the United States District Court for the Southern District of Mississippi, be impeached for high crimes and misdemeanors, and that the following articles of impeachment be exhibited to the Senate:

Articles of impeachment exhibited by the House of Representatives of the United States of America in the name of itself and all of the people of the United States of America, against Walter L. Nixon, Jr., a judge of the United States District Court for the Southern District of Mississippi, in maintenance and support of its impeachment against him for high crimes and misdemeanors.

Article I

On July 18, 1984, Judge Nixon testified before a Federal grand jury empaneled in the United States District Court for the Southern District of Mississippi (Hattiesburg division) to investigate Judge Nixon's business relationship with Wiley Fairchild and the handling of the criminal prosecution of Fairchild's son, Drew Fairchild, for drug smuggling. In the course of his grand jury testimony and having duly taken an oath that he would tell the truth, the whole truth, and nothing but the truth, Judge Nixon did knowingly and contrary to his oath make a material false or misleading statement to the grand jury.

The false or misleading statement was, in substance, that Forrest County District Attorney Paul Holmes never discussed the Drew Fairchild case with Judge Nixon.

Wherefore, Judge Walter L. Nixon, Jr., is guilty of an impeachable offense and should be removed from office.

Article II

On July 18, 1984, Judge Nixon testified before a Federal grand jury empaneled in the United States District Court for the Southern District of Mississippi to investigate Judge Nixon's business relationship with Wiley Fairchild and the handling of the prosecution of Fairchild's son, Drew Farichild, for drug smuggling. In the course of his grand jury testimony and having duly taken an oath that he would tell the truth, the whole truth, and nothing but the truth, Judge Nixon did knowingly and contrary to his oath make a material false or misleading statement to the grand jury.

The false or misleading statement was, in substance, that Judge Nixon had nothing whatsoever officially or unofficially to do with the Drew Fairchild case in Federal court or State court; and that Judge Nixon "never handled any part of it, never had a thing to do with it at all, and never talked to anyone, State or Federal, prosecutor or judge, in any way influence anybody" with respect to the Drew Fairchild case.

Wherefore, Judge Walter L. Nixon, Jr., is guilty of an impeachable offense and should be removed from office.

Article III

By virtue of his office as a judge of the United States District Court for the Southern District of Mississippi, Judge Nixon is required to uphold the integrity of the judiciary, to avoid impropriety and the appearance of impropriety, and to obey the laws of the United States.

Judge Nixon has raised substantial doubt as to his judicial integrity, undermined confidence in the integrity and impartiality of the judiciary, betrayed the trust of the people of the United States, disobeyed the laws of the United States and brought disrepute on the Federal courts and the administration of justice by the Federal courts by the following:

After entering into an oil and gas investment with Wiley Fairchild, Judge Nixon conversed with Wiley Fairchild, Carroll Ingram, and Forrest County District Attorney Paul Holmes concerning the State criminal drug conspiracy prosecution of Drew Fairchild, the son of Wiley Fairchild, and thereafter concealed those conversations as follows:

(1) Judge Nixon concealed those conversations through one or more material false or misleading statements knowingly made to an attorney from the United States Department of Justice and a special agent of the Federal Bureau of Investigation during an interview of Judge Nixon conducted in Biloxi, Mississippi, on April 19, 1984. The substance of the false of misleading statements included the following:

(a) Judge Nixon never discussed with Wiley Fairchild anything about Wiley's son's case.

(b) Wiley Fairchild never brought up his son's case.

(c) At the time of the interview Judge Nixon had no knowledge of the Drew Fairchild case and did not even know Drew Fairchild existed, except for what the judge previously read in the newspaper and what he learned from the questioners in the interview.

(d) Nothing was done or nothing was ever mentioned about Wiley Fairchild's son.

(e) Judge Nixon had never heard about the Drew Fairchild case, except what he told the questioners in the interview, and certainly had nothing to do with the case.

(f) Judge Nixon had done nothing to influence the Drew Fairchild case.

(g) State prosecutor Paul Holmes never talked to Judge Nixon about the Drew Fairchild case.

(2) Judge Nixon further concealed his conversations with Wiley Fairchild, Paul Holmes, and Carroll Ingram concerning the Drew Fairchild case by knowingly giving one or more material false or misleading statements to a Federal grand jury during testimony under oath in Hattiesburg, Mississippi, on July 18, 1984. The substance of the false or misleading statements included the following:

(a) Paul Holmes never discussed the Drew Fairchild case with Judge Nixon.

(b) To the best of his knowledge and recollection, Judge Nixon did not know of any reason he would have met with Wiley Fairchild after the Nixon-Fairchild oil and gas investment was finalized in February 1981.

(c) Judge Nixon gave the grand jury all the information that he had and that he could, and had withheld nothing during his grand jury testimony.

(d) Judge Nixon had nothing whatsoever unofficially to do with the Drew Fairchild criminal case in State court.

(e) Judge Nixon never talked to anyone, including the State prosecutor, about the Drew Fairchild case.

(f) Judge Nixon never had a thing to do with the Drew Fairchild case at all.

(g) Judge Nixon "never talked to anyone, State or Federal, prosecutor or judge, in any way influence anybody" with respect to the Drew Fairchild case.

Wherefore, Judge Walter L. Nixon, Jr., is guilty of an impeachable offense and should be removed from office.

XI. Mr. President, the House of Representatives by protestation, saving to themselves the liberty of exhibiting at any time hereafter any further articles of accusation or impeachment against the said Walter L. Nixon, Jr., district judge of the United States for the Southern District of Mississippi, and also of replying to his answers which he shall make unto the articles preferred against him, and of offering proof to the same and every part thereof, and to all and every other article of accusation or impeachment which shall be exhibited by them as the case shall require, do demand that the said

Walter L. Nixon, Jr., may be put to answer the misdemeanors in office which have been charged against him in the articles which have been exhibited to the Senate, and that such proceedings, examinations, trials, and judgments may thereupon be had and given as may be agreeable to law and justice. Mr. President, the managers on the part of the House of Representatives, by the adoption of the articles of impeachment which have just been read to the Senate, do now demand that the Senate take order for the appearance of the said Walter L. Nixon, Jr., to answer said impeachment and do now demand his conviction, and appropriate judgment thereon.

The PRESIDENT pro tempore. The Chair on the part of the Senate thanks the managers on the part of the House.

The majority leader is recognized.

Mr. MITCHELL. Mr. President, at this time the oath should be administered in conformance with Article I, Section 3, Clause 6 of the Constitution, and the Senate's impeachment rules. I move that the Senator from South Carolina [Mr. Thurmond] be designated by the Senate to administer the oath to the President pro tempore, the Senator from West Virginia [Mr. Byrd].

The PRESIDENT pro tempore. The question is on agreeing to the motion.

The motion was agreed to.

Mr. THURMOND. Do you solemnly swear that in all things appertaining to the trial of the impeachment of Walter L. Nixon, Jr., judge of the U.S. District Court for the Southern District of Mississippi, now pending, you will do impartial justice according to the Constitution and laws: So help you God?

The PRESIDENT pro tempore. I do.

Mr. MITCHELL. Mr. President, the oath shall now be administered by the President pro tempore to all Senators. This is an appropriate time for any Senator who has cause to be excused from service in this impeachment to make that fact known. If there is no Senator who desires to be excused, I move that the President pro tempore administer the oath to Members of the Senate.

The PRESIDENT pro tempore. The question is agreeing to the motion.

The motion was agreed to.

The PRESIDENT pro tempore. Senators will now raise their hands and take the oath.

Senators shall now be sworn: Do you solemnly swear that in all things appertaining to the trial of the impeachment of Walter L. Nixon, Jr., judge of the U.S. District Court for the Southern District of Mississippi, now pending, you will do impartial justice according to the Constitution and laws. So help you God?

SENATORS. I do.

The PRESIDENT pro tempore. The majority leader is recognized.

Mr. MITCHELL. Mr. President, any Senator who was not in the Senate Chamber at the time the oath was administered to the other Senators will make that fact known to the Chair so that the oath may be administered as soon as possible to the Senator.

The Secretary will note the names of the Senators who have been sworn, and will present to them for signing a book which will be the Senate's permanent record of the administration of the oath.

Mr. **Mitchell**. Mr. President, on behalf of myself and the distinguished Republican leader, Mr. Dole, I send to the desk a resolution that provides for the issuance of a summons to Judge Walter L. Nixon, Jr., for Judge Nixon's answer to the articles of impeachment against him, and for a replication by the House, and ask for its immediate consideration.

The **President** pro tempore. The clerk will report the resolution.

The legislative clerk read as follows:

A resolution (S. Res. 127) to provide for issuance of a summons and for related procedures concerning the articles of impeachment against Walter L. Nixon, Jr.

The **President** pro tempore. Is there objection to the immediate consideration of the resolution.

There being no objection, the Senate proceeded to consider the resolution.

The **President** pro tempore. The question is on agreeing to the resolution.

The resolution (S. Res. 127) was agreed to, as follows:

S. Res. 127

Resolved, That a summons shall be issued which commands Walter L. Nixon, Jr., to file with the Secretary of the Senate an answer to the articles of impeachment no later than May 31, 1989, and thereafter to abide by, obey, and perform such orders, directions, and judgments as the Senate shall make in the premises, according to the Constitution and laws of the United States.

Sec. 2. The Sergeant at Arms is authorized to utilize the services of the Deputy Sergeant at Arms or another employee of the Senate in serving the summons.

Sec. 3. The Secretary shall notify the House of Representatives of the filing of the answer and shall provide a copy of the answer to the House.

Sec. 4. The managers on the part of the House may file with the Secretary of the Senate a replication no later than June 12, 1989.

Sec. 5. The Secretary shall notify counsel for Walter L. Nixon, Jr., of the filing of a replication, and shall provide counsel with a copy.

Sec. 6. The Secretary shall provide the answer and the replication, if any, to the Presiding Officer of the Senate on the first day the Senate is in session after the Secretary receives them, and the Presiding Officer shall cause the answer and replication, if any, to be printed in the Senate Journal and in the Congressional Record. If a timely answer has not been filed the Presiding Officer shall cause a plea of not guilty to be entered.

Sec. 7. The articles of impeachment, the answer, and the replication, if any, together with the provisions of the Constitution on impeachment, and the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, shall be printed under the direction of the Secretary as a Senate document.

Sec. 8. The provisions of this resolution shall govern notwithstanding any provisions to the contrary in the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials.

Sec. 9. The Secretary shall notify the House of Representatives of this resolution.

Mr. **Mitchell**. Mr. President, I move to reconsider the vote by which the resolution was agreed to.

Mr. **Dole**. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

101st CONGRESS
1st Session

S. RES. 127

To provide for issuance of a summons and for related procedures concerning the articles of impeachment against Walter L. Nixon, Jr.

IN THE SENATE OF THE UNITED STATES

MAY 11 (legislative day, JANUARY 3), 1989

Mr. MITCHELL (for himself and Mr. DOLE) submitted the following resolution; which was considered and agreed to

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RESOLUTION

To provide for issuance of a summons and for related procedures concerning the articles of impeachment against Walter L. Nixon, Jr.

Resolved, That a summons shall be issued which commands Walter L. Nixon, Jr., to file with the Secretary of the Senate an answer to the articles of impeachment no later than May 31, 1989, and thereafter to abide by, obey, and perform such orders, directions, and judgments as the Senate shall make in the premises, according to the Constitution and laws of the United States.

SEC. 2. The Sergeant at Arms is authorized to utilize the services of the Deputy Sergeant at Arms or another employee of the Senate in serving the summons.

SEC. 3. The Secretary shall notify the House of Representatives of the filing of the answer and shall provide a copy of the answer to the House.

SEC. 4. The Managers on the part of the House may file with the Secretary of the Senate a replication no later than June 12, 1989.

SEC. 5. The Secretary shall notify counsel for Walter L. Nixon, Jr., of the filing of a replication, and shall provide counsel with a copy.

SEC. 6. The Secretary shall provide the answer and the replication, if any, to the Presiding Officer of the Senate on the first day the Senate is in session after the Secretary receives them, and the Presiding Officer shall cause the answer and replication, if any, to be printed in the Senate Journal and in the Congressional Record. If a timely answer has not been filed the Presiding Officer shall cause a plea of not guilty to be entered.

SEC. 7. The articles of impeachment, the answer, and the replication, if any, together with the provisions of the Constitution on impeachment, and the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, shall be printed under the direction of the Secretary as a Senate document.

SEC. 8. The provisions of this resolution shall govern notwithstanding any provisions to the contrary in the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials.

SEC. 9. The Secretary shall notify the House of Representatives of this resolution.

AMENDMENT TO THE ARTICLES OF IMPEACHMENT

(From the Congressional Record—Senate, October 5, 1989)

The PRESIDENT pro tempore. The Senator will receive a message from the House of Representatives.

At 10:16 a.m., a message from the House of Representatives, delivered by Ms. Goetz, one of its reading clerks, announced that the House has agreed to the following resolutions:

H. Res. 251. A resolution amending the articles of impeachment exhibited by the House of Representatives against Walter L. Nixon, a judge of the United States District Court for the Southern District of Mississippi; and

H. Res. 252. A resolution notifying the Senate of the amendment to the articles of impeachment against Judge Walter L. Nixon.

Mr. MITCHELL. Mr. President, I ask unanimous consent that the message just received from the House of Representatives be spread upon the Senate Journal and printed in the Congressional Record for the information of the Senate, and that the clerk be instructed to read the message of the House in full for the information of the Senate.

The PRESIDENT pro tempore. Without objection, it is so ordered. The clerk will proceed to read the message in full.

The assistant legislative clerk read as follows:

H. RES. 251

Resolved, That the articles of impeachment exhibited by the House of Representatives against Walter L. Nixon, a judge of the United States District Court for the Southern District of Mississippi, are amended in the second paragraph of article II and in paragraph (2)(G) of article III, by striking "in any way influence anybody" and inserting "that in any way influenced anybody".

H. RES. 252

Resolved, That a message be sent to the Senate by the Clerk of the House, informing the Senate that the House of Representatives has adopted amendments to the articles of impeachment exhibited against Walter L. Nixon, Jr., a judge of the United States District Court for the Southern District of Mississippi, and that the amendments will be presented to the Senate.

UNANIMOUS-CONSENT AGREEMENT ON FILING OF ANSWER AND REPLICATION

(From the Congressional Record—Senate, October 5, 1989)

Mr. MITCHELL. Mr. President, I ask unanimous consent that counsel for Judge Nixon be allowed 3 days from today to file such responsive pleadings to the amended articles of impeachment as counsel may choose to file, and that the House managers be allowed 3 days from the filing of any responsive pleadings to the amended articles of impeachment by Judge Nixon to file a replication.

I further ask unanimous consent that the procedures authorized by sections 3 through 9 of Senate Resolution 127 of this Congress for the handling and printing of pleadings in this impeachment proceeding, including printing in the Senate Journal, in the Congressional Record, and as a separate Senate document, shall be utilized with respect to pleadings filed under this unanimous-consent agreement.

The PRESIDENT pro tempore. Without objection, the various requests of the majority leader will be granted.

Mr. MITCHELL. Mr. President, I yield the floor.

ANSWER BY JUDGE WALTER L. NIXON, JR., TO THE AMENDED ARTICLES OF IMPEACHMENT AGAINST JUDGE NIXON

(From the Congressional Record—Senate, October 11, 1989)

The PRESIDENT pro tempore. The Chair submits to the Senate for printing in the Senate Journal and in the Congressional Record the answer by Judge Walter L. Nixon, Jr., to the amended articles of impeachment against Judge Nixon, pursuant to Senate Resolution 127, 101st Congress, 1st session, and the unanimous-consent agreement obtained October 5, 1989, which answer was received by the Secretary of the Senate on October 11, 1989.

The material follows:

ROPES & GRAY,
1001 PENNSYLVANIA AVENUE, N.W.,
Washington, DC, October 10, 1989.

Hon. WYCHE FOWLER, Jr.,
Chairman, Impeachment Trial Committee, Hart Senate Office Building, Washington, DC.
Attention: Anthony Harvey.

DEAR CHAIRMAN FOWLER: I enclose Judge Nixon's Answer to Amended Articles of Impeachment.

Very truly yours,

DAVID OVERLOCK STEWART.

CERTIFICATE OF SERVICE

I, David Overlock Stewart, do hereby certify that I have caused a copy of Judge Nixon's Answer to Amended Articles of Impeachment to be served by first-class mail, postage prepaid to:

Rep. Jack Brooks, House Manager.
Rep. Benjamin L. Cardin, House Manager.
Rep. William E. Dannemeyer, House Manager.
Rep. Jim Sensenbrenner, House Manager.
Rep. Don Edwards, House Manager.
Michael Davidson, Counsel, U.S. Senate (By Hand).
Alan I. Baron, Counsel, U.S. House of Representatives.

DAVID OVERLOCK STEWART.

Date: October 10, 1989.

[In the Senate of the United States, Sitting as a Court of Impeachment]

IN RE IMPEACHMENT OF JUDGE WALTER L. NIXON, Jr.

ANSWER TO AMENDED ARTICLES OF IMPEACHMENT

Judge Walter L. Nixon, Jr. of the Southern District of Mississippi, through his undersigned counsel, answers the amended Articles of Impeachment received by the Senate on Thursday, October 5, 1989:

ARTICLE I

Article I of the amended Articles of Impeachment alleges that Judge Nixon knowingly made a material false or misleading statement to a federal grand jury in Hattiesburg, Mississippi, on July 18, 1984, to wit, that Forrest County District Attorney Paul Holmes never discussed the Drew Fairchild case with Judge Nixon.

Judge Nixon states that his statement to the grand jury was, in fact, true and correct, and was not made with any intent to mislead, deceive, or give false testimony. Judge Nixon's only relevant conversation with Mr. Holmes concerned allegations by Wiley Fairchild that Mr. Holmes was blackmailing him, and there never was a discussion of the Drew Fairchild case between him and Mr. Holmes.

Judge Nixon states further that his responses to the prosecutor's question on that and other occasions were framed by his understanding, based on the prosecutors' statements, that their investigation concerned how Drew Fairchild's case was transferred from federal to state authorities; Judge Nixon had no knowledge of that transfer or how it occurred, never had any discussion or exchange with any individual on that subject until the investigation began, and understood questioning about the Drew Fairchild case to refer to that matter. Because this understanding also framed Judge Nixon's statements that are the subject of Impeachment Articles II and III, this paragraph of his Answer to Article I is hereby incorporated as part of the Answers to Articles II and III.

Judge Nixon states further that his conviction in court on this allegation was secured through the use of false and perjured testimony and by the suppression of exculpatory evidence, all in violation of basic fairness and the constitutional guarantee of Due Process of Law.

ARTICLE II

Article II of the amended Articles of Impeachment has been materially changed by the amendment. As amended, Article II alleges that Judge Nixon made material false or misleading statements to the grand jury on July 18, 1984, to wit, that he had nothing whatsoever officially or unofficially to do with the Drew Fairchild case in Federal court or state court, that he "never handled any part of it, never had a thing to do with it all, and never talked to anyone, State or Federal, prosecutor or judge, that in any way influenced anybody" with respect to the Drew Fairchild case.

Judge Nixon states that the allegation in Article II unfairly excerpts and takes his testimony out of context, and that the statements he actually made to the grand jury were true and correct and were not made with any intent to mislead, deceive or give false testimony. Judge Nixon was never involved in the Drew Fairchild case in any court and never handled any part of it as a judge, which is the meaning of his unexcerpted grand jury testimony.

The current allegation that Judge Nixon falsely denied that he had influenced any official concerning the Drew Fairchild case is materially different from the previous allegation, which was that Judge Nixon falsely denied that he attempted to influence any official concerning the Drew Fairchild case. The corrected allegation evidently refers to Judge Nixon's exchange with Forrest County District Attorney Paul Holmes about Wiley Fairchild's blackmail allegation. Judge Nixon had absolutely no reason to believe that he had influenced any official—in that exchange with Mr. Holmes or at any other time—concerning the Drew Fairchild case. Accordingly, Judge Nixon's testimony was truthful.

Judge Nixon states further that his conviction in court on an allegation similar to Article II was secured through the use of false and perjured testimony and by the suppression of exculpatory evidence, all in violation of basic fairness and the constitutional guarantee of Due Process of Law.

ARTICLE III

Article III of the amended Articles of Impeachment alleges that Judge Nixon has, through fourteen enumerated statements, raised substantial doubt as to his judicial integrity, undermined confidence in the integrity and impartiality of the judiciary, betrayed the trust of the people of the United States, disobeyed the laws of the United States and brought disrepute on the Federal courts and the administration of justice by the Federal courts.

As a threshold matter, Judge Nixon denies that this allegation—except for the allegation that he disobeyed the laws of the United States—states an impeachable offense under the Constitution, and he will present a Motion to Dismiss those other aspects of Article III.

A. Article III(1)

This section alleges that Judge Nixon made seven material false or misleading statements when he voluntarily submitted to an interview by the United States Department of Justice on April 19, 1984. These statements include:

(A) That Judge Nixon never discussed with Wiley Fairchild anything about Wiley's son's case. This statement was true and correct and was not made with any intent to mislead, deceive or provide false information. Moreover, the substance of this statement is virtually identical to grand jury testimony by Judge Nixon that was alleged to be false in Count II of his indictment, on which charge Judge Nixon was acquitted by the jury.

(B) That Wiley Fairchild never brought up his son's case. This statement was true and correct and was not made with any intention to mislead, deceive, or provide false information. Moreover, the substance of this statement is virtually identical to grand jury testimony by Judge Nixon that was alleged to be perjury in Count II of this indictment, on which charge Judge Nixon was acquitted by the jury. In addition, the identified statement is virtually identical to the statement charged in Impeachment Article III(1)(A), and therefore this allegation is duplicitous and redundant and should be stricken.

(C) That at the time of the interview Judge Nixon had no knowledge of the Drew Fairchild case and did not even know Drew Fairchild existed, except for what the judge previously read in the newspaper and what he learned from the questions in the interview. This specification does not accurately describe or refer to the actual statements by Judge Nixon, which statements were true and correct and were not made with any intent to mislead, deceive or provide false information.

(D) That nothing was done or nothing was ever mentioned about Wiley Fairchild's son. This allegation refers to a statement that is so vague that it is not possible to determine when, where, or by whom Judge Nixon stated that nothing was done or mentioned about Wiley Fairchild's son. Such a vague and imprecise statement cannot be deemed a material false or misleading statement. To the extent that the substance of the statement can be determined at all, it was true and correct, and was not made with any intent to mislead, deceive or provide false information. The points raised in answer to Impeachment Article I, which concerns a very similar statement by Judge Nixon to the grand jury, are hereby incorporated in this Answer as well.

(E) That Judge Nixon had never heard about the Drew Fairchild case, except what he told the questioners in the interview, and certainly had nothing to do with the case. This allegation distorts Judge Nixon's acutal statement and omits material portions of it in a misleading manner. Judge Nixon's actual statement was true and correct and was not made with any intent to mislead, deceive or provide false information.

(F) That Judge Nixon had done nothing to influence the Drew Fairchild case. This statement was true and correct and was not made with any intent to mislead, deceive or provide false information. Moreover, the allegation of falsity is virtually identical to that alleged in Article III(1)(E), making this allegation duplicitous and redundant.

(G) State prosecutor Paul Holmes never talked to Judge Nixon about the Drew Fairchild case. This allegation does not accurately describe Drew Fairchild's statement, which was that Mr. Holmes did not discuss Drew Fairchild's case with Judge Nixon. Judge Nixon's actual statement was true and correct and was not made with intent to mislead, deceive or provide false information. The points raised in answer to Impeachment Article I, which concerns a very similar statement by Judge Nixon to the grand jury, are hereby incorporated in this Answer as well.

B. Article III(2)

This section alleges that Judge Nixon made seven material false and misleading statements during his grand jury testimony on July 18, 1984. Five of those statements provide the basis for Impeachment Articles I and II: the statement identified in Impeachment Article III(2)(A) is also the basis for Article I; and the statements identified in Impeachment Articles III(2)(D), (E), (F), and (G) are also the basis for Article II. Consequently, it is multipicitous, redundant and fundamentally unfair to include identical allegations in separate Impeachment Articles and to Dismiss these elements of Impeachment Article III on those grounds. With respect to those allegations in Impeachment Articles III(2) (A), (D), (E), (F) and (G), Judge Nixon hereby incorporates herein the same answers that are made in the Answers to Impeachment Articles I and II above. (Judge Nixon notes further that the allegation in amended Article III(2)(G) has been changed in a material manner to reflect accurately Judge Nixon's actual grand jury testimony, as is explained above in Judge Nixon's Answer to Article II.)

Article III(2)(B) alleges that Judge Nixon falsely told the grand jury that to the best of his recollection he did not know of any reason he would have met with Wiley Fairchild after the Nixon-Fairchild oil and gas investment was finalized in February 1981. This allegation distorts and misstates Judge Nixon's actual grand jury testimony. Judge Nixon's actual testimony was true and correct and was not made with any intent to mislead, deceive, or provide false information.

Article III(2)(C) alleges that Judge Nixon falsely told the grand jury that he had given it all the information he had and that he could, and that he had withheld nothing during his grand jury testimony. This testimony also was true and correct and was not made with any intention to mislead, deceive or provide false testimony.

FIRST AFFIRMATIVE DEFENSE

As an affirmative defense, Judge Nixon alleges that he was targeted for investigation and prosecution by executive officials who vindictively resented his ruling against the government in the Petit Bois Island condemnation case, *United States v. 717.42 Acres of Land* (S.D. Miss., 1981). Such targeting and vindictive prosecution of judicial officers who rule against the government is repugnant to the constitutional separation of powers between the executive and judicial branches, subjects all judicial officers to improper pressure to rule in favor of the government and against private citizens, and works a fundamental distortion of our system of justice.

SECOND AFFIRMATIVE DEFENSE

As an affirmative defense, Judge Nixon alleges that the allegations against him were developed by executive officials who improperly coerced and induced witnesses to give false testimony, which false testimony has been knowingly introduced against him, in violation of Due Process of Law.

Wherefore Judge Nixon denies that any of the Articles of Impeachment states a valid basis for removing him from office under the Constitution and demands a trial before the full United States Senate as provided in the Constitution, Article I, Section 3.

Respectfully submitted,

BOYCE HOLLEMAN,
MICHAEL B. HOLLEMAN,
BOYCE HOLLEMAN, P.A.,
Gulfport, MS.
DAVID OVERLOCK STEWART,
PETER M. BRODY,
ROPES & GRAY,
Washington, DC.

Date: October 10, 1989.

Mr. **HARKIN**. Mr. President, I suggest the absence of a quorum.

The **PRESIDENT** pro tempore. The absence of a quorum has been suggested. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. **MITCHELL**. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The **PRESIDENT** pro tempore. Without objection, it is so ordered.

REPLICATION OF THE HOUSE OF REPRESENTATIVES TO THE ANSWER BY JUDGE WALTER L. NIXON, JR., TO THE AMENDED ARTICLES OF IMPEACHMENT

(From the Congressional Record—Senate, October 16, 1989)

The PRESIDING OFFICER. The Chair submits to the Senate for printing in the Senate Journal and in the Congressional Record the replication of the House of Representatives to the answer by Judge Walter L. Nixon, Jr., to the amended articles of impeachment, as well as the House of Representatives' brief in support of the articles of impeachment, pursuant to Senate Resolution 127, 101st Congress, 1st Session, and the unanimous-consent agreement obtained October 5, 1989, which replication and brief were received by the Secretary of the Senate on October 16, 1989.

The material follows:

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC, October 13, 1989.

Hon. WYCHE FOWLER, JR.,
Chairman, Impeachment Trial Committee, Washington, DC.

(Attention: Anthony Harvey).

DEAR MR. CHAIRMAN: Enclosed please find the original and twelve (12) copies of the House of Representatives' Replication to Judge Nixon's Answer to the Amended Articles of Impeachment, for filing in connection with the Nixon impeachment.

Per Mr. Purdy's instructions, also enclosed is the original of the House of Representatives' Brief in Support of the Articles of Impeachment. A copy of the brief has been forwarded to the Government Printing Office for binding.

This letter will also confirm that copies of these documents have been served today upon counsel for Judge Nixon.

Sincerely,

ALAN I. BARON,
Special Counsel.

[In the Senate of the United States, Sitting as a Court of Impeachment]

IN RE IMPEACHMENT OF JUDGE WALTER L. NIXON, JR.

REPLICATION OF THE HOUSE OF REPRESENTATIVES TO THE ANSWER OF JUDGE WALTER L. NIXON, JR., TO THE AMENDED ARTICLES OF IMPEACHMENT

The House of Representatives, through its Managers and counsel, replies to the Answer to the Amended Articles of Impeachment of Respondent, Judge Walter L. Nixon, Jr., as follows:

Article I

The first paragraph of Respondent's Answer to Article I simply summarizes that article and requires no response by the House of Representatives.

The House of Representatives denies each and every allegation set forth in the second, third and fourth paragraphs of Respondent's Answer to Article I.

Article II

The House of Representatives denies that Article II has been materially changed by the amendment, which simply changed the phrase "in any way influence" to "that in any way influenced," so as to conform exactly with the evidence at trial.

The remainder of the first paragraph of Respondent's answer to Article II simply summarizes that article and requires no response by the House of Representatives.

The House of Representatives denies each and every allegation set forth in the second, third and fourth paragraphs of Respondent's Answer to Article II.

The House also denies Judge Nixon's contention that the amendment changes the substance of the charge contained in Article II. In both the original version and amended Article II, the question raised is whether Judge Nixon influenced anyone in connection with the Drew Fairchild drug case. The evidence adduced at trial established that Judge Nixon did in fact influence Forrest County District Attorney Paul Holmes and Wiley Fairchild in connection with the drug case, and knew he had done so. Accordingly, Judge Nixon's grand jury testimony at issue in Article II was false or misleading as charged.

Article III

The first paragraph of Respondent's Answer to Article III simply summarizes that Article and requires no response by the House of Representatives.

With regard to all remaining paragraphs of Respondent's Answer to Article III, the House of Representatives denies each and every allegation in the answer that denies the acts, knowledge, intent or wrongful conduct charged against respondent in Article III, or that otherwise suggests that respondent's grand jury testimony and interview statements were true and correct. The House of Representatives further states that Article III properly alleges an impeachable offense, is not subject to a motion to dismiss, and should be considered and adjudicated by the Senate sitting as a Court of Impeachment. The House of Representatives incorporates by reference, in its Replication to Respondent's Answer to Article III, its response to the Answer of Respondent to Articles I and II.

1. *Article III(1)*

In addition to the foregoing, the House of Representatives responds to Repondent's Answer to the specific allegations of Article III(1)(A) through (G) as follows:

(A) The House of Representatives denies that the impeachment charge alleged in Article III(1)(A) is "virtually identical" to the Count II prejury charge on which Respondent was acquitted by the jury, and further denies that the jury verdict of acquittal on Count II of Respondent's criminal indictment in any way bars consideration by the Senate of Article III(1)(A).

(B) The House of Representatives denies that the impeachment charge alleged in Article III(1)(B) is "virtually identical" to the Count II perjury charge on which Respondent was acquitted by the jury, and further denies that the jury verdict of acquittal on Count II of Respondent's criminal indictment in any way bars consideration by the Senate of Article III(1)(B). The House of Representatives also denies that the allegations in subsections (A) and (B) of Article III(1) are "duplicitous and redundant." Subsections (A) and (B) of Article III allege two distinct false or misleading statements by Respondent, and both subsections should be considered and adjudicated by the Senate.

(C) The House of Representatives denies that Article III(1)(C) "does not accurately describe or refer" to actual statements by Respondent.

(D) The House of Representatives denies that the statement by Respondent referred to in Article III(1)(D) is "vague and imprecise," and states that the Senate can and should deem this to be a material or misleading statement.

(E) The House of Representatives denies that Article III(1)(E) "distorts" or "omits material portions" of Respondent's actual statement in a "misleading manner."

(F) The House of Representatives denies that the allegations in subsection (E) and (F) of Article III(1) are "duplicitous and redundant." Subsections (E) and (F) of Article III(1) allege two distinct false or misleading statements by Respondent, and both subsections should be considered and adjudicated by the Senate.

(G) The House of Representatives denies that Article III(1)(G) "does not accurately describe" Respondent's statement during the April 1984 interview.

2. *Article III(2)*

In addition to the foregoing, with regard to Respondent's Answer to the specific statements alleged in Article III(2), the House of Representatives agrees that the statement of Respondent set forth in Article I is also the basis for Article III(2)(A), and that the statements of Respondent set forth in Article II are also the basis for Article III(2) (D), (F) and (G).

The House of Representatives denies that the statement of Respondent set forth in Article II is also the basis for Article III(2)(E), inasmuch as the specific statement set forth in Article III(2)(E) was not an "underscored material declaration" in Count IV of Respondent's criminal indictment found by the jury to be false. Article III(2)(E) addresses a separate, distinct instance, not alleged in Article II, when Judge Nixon swore to the grand jury that he never talked to anyone, including the State prosecutor, about the Drew Fairchild case. However, the House of Representatives acknowledges that the statements set forth in Articles II and III(2)(E) were each part of Respondent's lengthy response during his grand jury testimony to the question, "Judge, do you have anything you want to add?"

The House of Representatives denies that Article III(2) is "multiplicitous, redundant and fundamentally unfair." Article III properly alleges an impeachable offense, is distinct from Articles I and II, and should be considered and adjudicated by the Senate. The House of Representatives denies that any portion of Article III is defective, and will oppose any motion to dismiss all or part of Article III.

The House of Representatives denies that Article III(2)(G) has been changed in a "material" manner by the amendment, which simply changes "in any way influence" to "that in any way influenced" so as to conform exactly to the evidence at trial.

The House of Representatives denies that Article III(2)(B) "distorts and misstates" Respondent's actual grand jury testimony.

First affirmative defense

The House of Representatives denies each and every allegation of this purported defense. This defense was abandoned by Judge Nixon prior to trial, and no evidence has been presented in support of this defense. The House of Representatives further states that this purported defense is not relevant to the Impeachment Articles and is insufficient as a matter of law. This purported defense of "vindictive prosecution" is a question particularly appropriate for judicial resolution that has been finally resolved by the judicial branch against Respondent without pending appeal. Respondent should thereby be estopped from raising this issue during the impeachment proceedings. The House of Representatives further asserts that such "vindictive prosecution," even if true as alleged, cannot excuse or be a defense to the misconduct by Respondent set forth in the Articles of Impeachment.

Second affirmative defense

The House of Representatives denies each and every allegation of this purported defense. The House of Representatives asserts that this purported defense is not relevant to the Impeachment Articles and is insufficient as a matter of law. This purported defense of prosecutorial misconduct is a question particularly appropriate for judicial resolution that has been finally resolved by the judicial branch against Respondent. Respondent should thereby be estopped from raising this issue during the impeachment proceedings. The House of Representatives further asserts that such prosecutorial misconduct, even if true as alleged, cannot excuse or be a defense to the misconduct by Respondent set forth in the Articles of Impeachment.

Wherefore, the House of Representatives states that each of the Articles of Impeachment presents a valid basis for removing Respondent from office. Each of the three Articles should be considered and adjudicated by the Senate.

With regard to Respondent's demand for "trial before the full United States Senate," the House of Representatives denies that Article I, Section 3 of the Constitution requires that evidence be taken by the full Senate, rather than by a Committee formed pursuant to Senate Impeachment Rule XI.

Respectfully submitted,

THE U.S. HOUSE OF REPRESENTATIVES,
(By) ALAN I. BARON,
Special Counsel.

Managers of the House of Representatives: Jack Brooks, Don Edwards, Benjamin L. Cardin, F. James Sensenbrenner, William E. Dannemeyer.

Impeachment Trial Staff: Alan I. Baron, Special Counsel; Peter E. Keith, Assistant Special Counsel.

House Judiciary Committee staff participating in the impeachment proceedings: William Jones, General Counsel; Daniel Freeman, Counsel; Catherine A. LeRoy, Counsel; Colleen Kiko, Counsel.

Date: October 13, 1989.

POST-TRIAL BRIEFS AND MEMORANDA SUBMITTED BY THE PARTIES

IN THE SENATE OF THE UNITED STATES

Sitting as a Court of Impeachment

IN RE IMPEACHMENT OF JUDGE WALTER L. NIXON, JR.

BRIEF OF THE HOUSE OF REPRESENTATIVES IN SUPPORT OF THE ARTICLES OF IMPEACHMENT

MANAGERS OF THE HOUSE OF REPRESENTATIVES

Jack Brooks
Don Edwards
Benjamin L. Cardin
F. James Sensenbrenner
William E. Dannemeyer

IMPEACHMENT TRIAL STAFF

Alan I. Baron, Special Counsel
Peter E. Keith, Assistant Special Counsel

HOUSE JUDICIARY COMMITTEE STAFF PARTICIPATING IN IMPEACHMENT TRIAL PREPARATION

William M. Jones, General Counsel
Daniel Freeman, Counsel
Catherine A. LeRoy, Counsel
Colleen Kiko, Minority Counsel

OCTOBER 13, 1989

24-226 0 - 89 - 2

IN THE SENATE OF THE UNITED STATES
Sitting as a Court of Impeachment

In re)
)
IMPEACHMENT OF)
JUDGE WALTER L. NIXON, JR.)

THE HOUSE OF REPRESENTATIVES' BRIEF IN SUPPORT OF THE ARTICLES OF IMPEACHMENT

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APPENDIX - The House of Representatives' Response To Judge Nixon's Motion To Dismiss Article III, filed July 7, 1989

IN THE SENATE OF THE UNITED STATES
Sitting as a Court of Impeachment

In re	)
	)
IMPEACHMENT OF	)
JUDGE WALTER L. NIXON, JR.	)

THE HOUSE OF REPRESENTATIVES' BRIEF IN SUPPORT OF THE ARTICLES OF IMPEACHMENT

EXECUTIVE SUMMARY

Walter L. Nixon, Jr., Chief Judge of the U.S. District Court for the Southern District of Mississippi, is only the second federal judge in the history of the United States to be convicted of a felony while serving on the bench. Judge Nixon was convicted by a federal jury in February, 1986 of two counts of perjury, and was sentenced to five years in prison. He is currently serving that sentence.

After conducting an independent investigation into Judge Nixon's fitness to hold the high office of federal judge, on May 10, 1989 the House of Representatives voted 417-0 in favor of three Articles of Impeachment seeking Judge Nixon's removal from office.

The three Articles of Impeachment are based upon a series of false statements given by Judge Nixon, first in a recorded interview with federal law enforcement authorities, and later in sworn testimony under oath before a federal grand jury. Articles I and II focus upon the same grand jury testimony that led to Judge Nixon's two perjury convictions. Article III recites a total of

14 false statements, seven in the recorded interview and seven in his sworn grand jury testimony, that demonstrate Judge Nixon is unfit to remain on the bench.

As established during trial before the Impeachment Trial Committee (Senator Fowler, Chairman and Senator Danforth, Vice-Chairman), Judge Nixon solicited and obtained a lucrative oil and gas investment from Wiley Fairchild, a wealthy Hattiesburg, Mississippi businessman. The investment, financed entirely by Fairchild through a $9500 loan at a below-market interest rate, generated more than $60,000 in royalty income for Judge Nixon by the date of his criminal trial. Grateful for this valuable investment which was not available to the general public, Judge Nixon told Fairchild, "If I can ever help you I will, and if I can't I'll just tell you I can't."

An opportunity for Judge Nixon to return this favor arose when Wiley Fairchild's son, Drew Fairchild, was prosecuted for smuggling a planeload of marijuana through the Hattiesburg airport. The local District Attorney who handled the case was Paul H. "Bud" Holmes, a close friend of Judge Nixon's for 30 years. Although Drew Fairchild had agreed to plead guilty to drug smuggling in return for a sentence of no jail time, a fine and five years probation, the case dragged on with no disposition.

Wiley Fairchild complained to Judge Nixon that District Attorney Holmes was blackmailing him in connection with the Drew Fairchild drug case. Fairchild told Judge Nixon that his son Drew was guilty, but that Drew's partner at the airport was also guilty and had never been prosecuted. Admittedly grateful for his investment with Fairchild and "enthusiastic" about the prospect of additional investments, Judge Nixon knew that Fairchild wanted him to speak with District Attorney Holmes about the drug bust.

That very same day, Judge Nixon spoke with Bud Holmes about the drug case and "put in a good word" for Wiley Fairchild's son. To help his old friend Judge Nixon solidify his financial relationship with Wiley Fairchild, Holmes told Judge Nixon he would "pass the case to the file." In Mississippi practice, this meant that the case would become inactive with no fine, no probation or other adverse consequences to Drew Fairchild.

After Holmes told him that the Drew Fairchild drug case would be passed to the file, Judge Nixon telephoned Wiley Fairchild and told him that the case would be taken care of to Fairchild's satisfaction. Bud Holmes told Fairchild in the same telephone call, "when this man [Judge Nixon] asks me to do something, I don't ask questions. I just go ahead and do it." Judge Nixon later told Wiley Fairchild's attorney, Carroll Ingram, that he was interested in other investments with Fairchild and had spoken with Holmes about the Drew Fairchild drug case, with "positive" results.

In December 1982, the Drew Fairchild drug smuggling case was passed to the file upon motion by District Attorney Holmes. Wiley Fairchild and Bud Holmes have testified that but for Judge Nixon's involvement, the Drew Fairchild case would not have been passed to the file. In essence, because of Judge Nixon's involvement, criminal charges against Drew Fairchild were temporarily dropped, notwithstanding Drew's admitted involvement in smuggling a planeload of marijuana into the United States.

Acting upon information supplied by one of Wiley Fairchild's employees, in late 1983 Federal law enforcement authorities began to investigate the Nixon-Fairchild investment and the strange handling of the Drew Fairchild case. In April 1984, during a recorded interview with an FBI agent and a Department of Justice attorney, Judge Nixon was questioned about his knowledge of and involvement in the Drew Fairchild drug case. During the interview Judge Nixon did not disclose his contacts with Holmes, Fairchild and Ingram about the drug case, but instead repeatedly and categorically denied any involvement in the case. These false statements are the basis for part of impeachment Article III.

In July 1984, Judge Nixon testified before a federal grand jury empaneled to investigate the handling of the Drew Fairchild drug smuggling case. Again, Judge Nixon did not disclose his involvement in the drug case, but instead swore that he never discussed the case with Holmes, never talked to anyone about the case, and "didn't know" of any reason he would have met with Wiley Fairchild after consummating the investment. Judge Nixon's grand jury testimony led to his conviction on two counts of perjury following a two-week criminal trial in February, 1986. Judge Nixon's false grand jury statements are the basis for impeachment Article I, Article II and the remainder of Article III.

In his testimony before the Senate Impeachment Trial Committee, Judge Nixon admitted having conversations with Wiley Fairchild and Bud Holmes concerning the drug case. But for the first time, and as his principal defense, Judge Nixon claimed he "did not recall" those events at the time of his interview and his grand jury appearance.

Judge Nixon's Senate testimony on this point was utterly false, and completely at odds with the Judge's own prior sworn testimony. During his criminal trial, Judge Nixon repeatedly testified that he specifically remembered his contacts with Wiley Fairchild and Bud Holmes at the time of his interview and his grand jury appearance. Moreover, during the House impeachment proceedings, Judge Nixon never suggested he "forgot" about the events at the time of his interview and grand jury appearance. Instead, during his House testimony Judge Nixon claimed he consciously chose not to "volunteer" those facts because he felt Fairchild's blackmail complaint was a "misunderstanding" that "had been resolved," and that it would have been "irresponsible" for him to "go around blabbing" about the events to the grand jury.

But in his testimony before the Senate, Judge Nixon completely reversed his earlier position on this critical point concerning his state of mind. For the first time he claimed that during his interview and his grand jury appearance, he did not recall his meetings with Holmes and Fairchild. By his lie to the Senate on this simple but seminal point, Judge Nixon completely destroyed his own credibility as a witness, and demonstrated why he must be removed from office.

Impeachment is not a criminal proceeding. It is a remedial process designed to protect our institutions of government and the American people from individuals who are unfit to hold positions of public trust. In this case, Judge Nixon engaged in conduct that not only is criminal, but that also requires his removal from office.

Judge Nixon repeatedly lied to federal law enforcement officials during an investigation, a crime. Judge Nixon thereafter repeatedly lied under oath in testimony before a federal grand jury, also a crime. The evidence shows that Judge Nixon has no regard for the truth and is unfit to hold the high office of federal judge. Accordingly, the House of Representatives urges the Senate to remove Judge Nixon from the bench.

INTRODUCTION

1. Background To Senate Consideration

On March 15, 1988, following Judge Nixon's perjury convictions and exhaustion of his appellate rights, the Judicial Conference of the United States certified and transmitted to the Speaker of the House of Representatives a determination that Judge Nixon's impeachment may be warranted. Two days later Resolution 407, impeaching Judge Nixon, was introduced in the House.

The Constitution requires that impeachment proceedings have two separate and distinct stages. Article I, Section 2 states that the House of Representatives "shall have the sole Power of Impeachment," while Article I, Section 3 provides that "The Senate shall have the sole Power to try all Impeachments." The House of Representatives, therefore, inquires into whether an officer of the United Sates should be impeached, while the Senate conducts the trial if the House adopts articles of impeachment.

Mindful of the need for an independent judiciary and the gravity of impeachment proceedings, the House conducted a thorough, independent investigation of the conduct of Judge Nixon. Consistent with the Senate's decision during the 1986 impeachment of Judge Harry Claiborne, the House did not feel bound by the jury verdict in Judge Nixon's criminal trial.

As part of the House investigation, the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary conducted seven full days of hearings. Throughout the House proceedings Judge Nixon was afforded full opportunity to cross-examine witnesses, testify on his own behalf, present witnesses and documentary evidence, and argue his cause both orally and in writing.

After carefully considering the evidence, the House of Representatives concluded that Judge Nixon lied to federal investigators during a recorded interview, and later in sworn testimony before a federal grand jury, concerning his behind-the-scenes involvement in the drug smuggling prosecution of Drew

Fairchild, son of a wealthy businessman who had provided Judge Nixon with a lucrative oil investment. On May 10, 1989, the House of Representatives voted 417-0 in favor of three Articles of Impeachment against Judge Nixon.

The Articles of Impeachment voted upon by the House were in part based upon a written transcript of Judge Nixon's grand jury testimony. At his criminal trial Judge Nixon stipulated to the accuracy of his grand jury transcript. However, during trial before the Senate Impeachment Trial Committee, Judge Nixon retracted his prior stipulation. Judge Nixon insisted that the phrase "in any way influence anybody" appearing in the transcript and quoted in Articles II and III(2)(G) was erroneous, and that he had used different words not appearing in the transcript.

Through the use of sophisticated sound equipment, the House reviewed the tape of Judge Nixon's grand jury testimony and confirmed that the Judge in fact used the words "that in any way influenced" rather than "in any way influence." The House accordingly stipulated to this change at trial before the Senate Impeachment Trial Committee.

This minor change was of no significance whatsoever with regard to the substance of the charges against Judge Nixon. Nevertheless, to eliminate any confusion among the Senate and in fairness to Judge Nixon, the House of Representatives amended Articles II and III (2)(G) to conform to the trial stipulation. On October 2, 1989 the House approved this technical amendment and so notified the Senate by vote of 370 to 0 in favor of House Resolutions 251 and 252.

2. The Three Articles of Impeachment

The three Articles of Impeachment charge Judge Nixon with knowingly making false or misleading statements to federal law enforcement officials during an interview in Judge Nixon's chambers in Biloxi, Mississippi in April 1984, and in sworn testimony before a federal grand jury in Hattiesburg, Mississippi in July 1984. Both the interview and grand jury testimony occurred during a federal investigation of Judge Nixon's financial relationship with Hattiesburg businessman Wiley Fairchild and the unusual handling of the criminal prosecution of Fairchild's son Drew, a co-conspirator in a plan to smuggle a planeload of marijuana through the Hattiesburg airport.

Article I deals with Judge Nixon's statement under oath to the grand jury that Forrest County District Attorney Paul Holmes, the State prosecutor who handled the Drew Fairchild drug smuggling case, never discussed the Drew Fairchild case with Judge Nixon. This specific statement was found by the jury in the criminal trial to be false, and resulted in Judge Nixon's conviction on one of the perjury counts. As a result of its independent investigation, the House reached the same conclusion as the jury in finding this testimony to be false.

Article II deals with Judge Nixon's sworn statement to the grand jury that he had nothing whatsoever, officially or unofficially, to do with the Drew Fairchild case; never talked to anybody, including the State prosecutor, about the case; and never influenced anyone with respect to the case. This specific statement was also found by the jury to be false in Judge Nixon's criminal trial, and led to his conviction on a second count of perjury. As a result of its independent investigation, the House reached the same conclusion as the jury in finding this testimony to be false.

Article III charges Judge Nixon with undermining the integrity of the judiciary, disobeying the law and bringing disrepute on the courts by making a series of fourteen false or misleading statements during his recorded interview with federal investigators and in his sworn grand jury testimony. This series of statements reveals a conscious and deliberate effort by Judge Nixon to conceal the truth concerning his behind-the-scenes involvement in the Drew Fairchild drug smuggling case.

Article III re-alleges the grand jury testimony at issue in Articles I and II. In addition, Article III recites Judge Nixon's false statements to the grand jury that he "never talked to anyone about the [Drew Fairchild] case;" that he knew of no reason he would have met with Wiley Fairchild after the Nixon-Fairchild investment was finalized in February 1981; and other grand jury testimony for which Judge Nixon was not indicted. Article III also includes seven statements by Judge Nixon in his interview with federal investigators including, inter alia, that Wiley Fairchild never brought up his son's case, that nothing was ever mentioned about Drew Fairchild, that Judge Nixon never talked with state prosecutor Holmes about the Drew Fairchild case, and that the Judge didn't even know Drew Fairchild existed except for what he had read in the newspaper. These interview and grand jury statements by Judge Nixon were just as false as the testimony for which he was convicted.

Article III is patterned upon "omnibus" articles traditionally used in judicial impeachments. In every impeachment this century that resulted in conviction, the House has presented and the Senate has voted upon an article that sets out a judge's collective misconduct and describes the effect of his misbehavior on the integrity of the judiciary.

For example, Judge Halsted Ritter (1936) was charged in a final article of impeachment with misconduct, previously alleged in earlier articles, that had the cumulative effect of "bring[ing] his court into scandal and disrepute, to the prejudice of said court and public confidence in the administration of justice therein, and to the prejudice of public respect for and confidence in the Federal judiciary . . . ."[1] The Senate found Judge Ritter guilty of the omnibus charge.

Similarly, in the 1986 impeachment of Judge Harry Claiborne, the Senate voted upon and convicted Judge Claiborne of an omnibus article (Claiborne Article IV) containing some of the very same language presented in Nixon Article III:

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[1] Congressional Record, Senate Proceedings, 74th Cong., 2d Sess., March 31, 1936 at 4655 (hereinafter "Ritter Proceedings").

> "Judge Harry E. Claiborne, by virtue of his office, is required to uphold the integrity of the judiciary and to perform the duties of his office impartially.
>
> Judge Harry E. Claiborne . . . has betrayed the trust of the people of the United States and reduced confidence in the integrity and impartiality of the judiciary, thereby bringing disrepute on the Federal courts and the administration of justice."[2]

In the pending impeachment of Judge Alcee L. Hastings, the final article (Article XVII) is an omnibus article alleging that Judge Hastings, through his collective misconduct, did

> ". . . undermine confidence in the integrity and impartiality of the judiciary and betray the trust of the people of the United States, thereby bringing disrepute on the Federal courts and the administration of justice by the Federal courts."

In the Hastings impeachment, on March 16, 1989, by a vote of 93 to 0, the Senate resoundingly denied a motion to dismiss in which Judge Hastings claimed that the omnibus article failed to allege an impeachable offense.[3]

There is good reason for the Senate to consider an omnibus article that collects a judge's misbehavior and recites its impact on judicial integrity. As argued by the House Managers in the Ritter proceeding, the omnibus article alleges

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[2] Report of the Senate Impeachment Trial Committee, Hearings before the Senate Impeachment Trial Committee, United States Senate, 99th Cong., 2nd Session, Part 1 of 4 parts, at 9.

[3] See Impeachment of Judge Alcee L. Hastings, Motions to Dismiss, 101st Cong., 1st Sess., Doc. No. 101-4, printed February 2, 1989 at 98-105 and 220-221, containing Judge Hastings' written motions and supporting memoranda. Oral argument on the motion appears in 135 Congressional Record No. 29, March 15, 1989, at S2549-S2564.

> ". . . a substantial doubt as to judicial integrity . . . . We contend that this is the highest crime which a judge can commit on the bench. It is not whether he did this thing, that thing, or the other thing, but whether or not the sum total of the things he has done has made the people doubt his integrity as a judicial officer."[4]

The special duty and standard of conduct required of Federal judges is at the heart of Nixon Article III, just as with prior omnibus articles. The purpose of such an article was perhaps best described by House Manager Peter Rodino in the Claiborne case:

> "Conviction on [Claiborne] Article IV, however, rests on a separate and compelling legal theory, which has roots deeply embedded in the impeachment power. In 1936, the Senate convicted Judge Halsted L. Ritter of bringing disrepute upon the Federal judiciary that he had been chosen to represent.
>
> As Members of this body have recognized in prior judicial impeachments, the judges of our Federal courts occupy a unique position of trust and responsibility in our system of government: They are the only members of any branch who hold their office for life; they are purposely insulated from the immediate pressures and shifting currents of the body politic. But with this special prerogative of judicial independence comes the most exacting standard of public and private conduct."[5]

Nixon Article III is a separate and distinct charge that focuses on the integrity of the judiciary, and alleges that Respondent's cumulative misconduct and the devastating consequences of his misconduct to the judiciary warrant his removal from office. Even if Judge Nixon is found "not guilty" on Articles I and II, the Senate must examine the four statements of Respondent at issue in those Articles and realleged in Article III, as well as the ten other statements set forth in Article III, in determining whether Judge Nixon's misconduct in toto, and its effect on judicial integrity, warrants a vote of "guilty" as to Article III.

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[4] Ritter Proceedings, supra, at 4658.

[5] Proceedings of the United States Senate, 99th Cong., 2d Sess., S. Doc. 99-48, at 122.

Under Article III, should a Senator find one or more of the fourteen statements alleged therein to be false or misleading, that Senator may vote to convict. If two-thirds of the Senate agree that Judge Nixon made one or more false or misleading statements, such that he is no longer fit to serve as a federal judge, Judge Nixon will be properly removed from office.[6]

Judge Nixon's misconduct warrants his removal from the federal bench. Judge Nixon's repeated false or misleading statements in his interview and before the grand jury are grossly inconsistent with the high standard of behavior expected of federal judges. His lack of candor undermines the integrity of the judiciary and requires his removal from office.

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[6] Prior to trial Judge Nixon moved to dismiss Article III, citing the very same arguments rejected by the Senate by vote of 93 to 0 on March 16, 1989 in connection with the Hastings impeachment. Because of the Hastings vote, by order dated July 25, 1989, the Impeachment Trial Committee declined to refer Judge Nixon's motion to the full Senate. Under the Committee's order, Judge Nixon was permitted to renew his motion before the full Senate after trial before the Committee. However, as of the date of this brief, Judge Nixon has not renewed his motion to dismiss.

Judge Nixon's interview statements and grand jury testimony fall far short of the truthfulness required of any ordinary witness, much less a man privileged to wear the robe of a federal judge. Judge Nixon's misdeeds demonstrate that he is unfit to perform such important tasks as assessing the credibility of others and seeking the truth in matters that come before the federal court. His decision to hide the truth and the predictable consequences of that misconduct--his indictment, conviction, incarceration and suspension from the practice of law--stand as an embarrassment to the federal judiciary.

STATEMENT OF FACTS

1. Judge Nixon's Oil Investment with Wiley Fairchild

In February, 1979 Judge Nixon approached Carroll Ingram, who was a friend and a Hattiesburg, Mississippi, attorney who regularly practiced before him. Feeling hampered by his judicial salary and hoping to generate additional income, Judge Nixon specifically asked Mr. Ingram about the possibility of making an oil investment with one of Mr. Ingram's clients, Hattiesburg construction and oil millionaire Wiley Fairchild (Ingram Senate Tr. 161; Ingram House Tr. 340-343; Nixon House Tr. 420-421; Nixon Senate Tr. 244).[7] Judge Nixon did not know Wiley Fairchild personally at the time (W. Fairchild Trial Tr. 492; Ingram Trial Tr. 1027; Nixon House Tr. 420; Nixon Senate Tr. 244).[5]

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[7] By order of the Impeachment Trial Committee dated July 25, 1989, the Senate admitted into evidence the complete testimony and exhibits from the House impeachment proceedings, the criminal trial and the post-conviction proceedings. The Senate Impeachment Trial Committee heard live testimony on September 7-12, 1989. Citations

Thereafter, Judge Nixon checked on Wiley Fairchild's reputation with several persons, including Paul H. "Bud" Holmes, District Attorney for Forrest County, Mississippi during 1980-1984 and a very close friend of Judge Nixon for thirty years (Holmes House Tr. 227-228; Nixon House Tr. 421). Mr. Holmes told Judge Nixon that Wiley Fairchild had a reputation for getting close to influential people and that an oil investment with Mr. Fairchild would be "very, very safe," to the point that Mr. Fairchild would

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to the record appear as follows in this brief:

1. Criminal trial testimony from *U.S. v. Nixon* -- Ingram Trial Tr. ___
2. House Subcommittee testimony of June-July, 1988 (printed in Serial No. 96) -- Ingram House Tr. ___
3. House Subcommittee testimony of March, 1989 (printed in Serial No. 3) -- Lubet House Tr. 3/2/89, ___
4. Exhibits from the House Subcommittee hearings of June-July, 1989 (printed in Serial No. 96, Appendix I) -- Subcomm. Ex. __, or Ex. N-__
5. Exhibits from the House Subcommittee hearing of March, 1989 -- Subcomm. Ex. __, 3/2/89
6. Post-conviction testimony of August, 1988 from *Nixon v. U.S.* -- Hess P. C. Tr. ____
7. Testimony at trial before the Senate Impeachment Committee in September, 1989 -- Ingram Senate Tr. ___
8. Exhibits introduced at trial before the Senate Impeachment Committee in September, 1989 -- House Ex. ___ or Nixon Ex. ___

[5] It is improper for a federal judge to solicit an investment from someone he does not know through an attorney who practices before him (Kaufman House Tr., 3/2/89, at 37; Lubet House Tr., 3/2/89, at 16; Canon 5(c)(1) of the Code of Judicial Conduct, reprinted at p. 417 of the House proceedings of March 2, 1989).

"pour oil down the hole" if necessary to make the investment profitable (Holmes Senate Tr. 91; Holmes Trial Tr. 727-728; Nixon Trial Tr. 1464-1465, 1468-1469, 1480; Holmes House Tr. 233; Nixon House Tr. 421).

In the spring of 1979, Judge Nixon attempted to contact Mr. Ingram to confirm the Judge's interest in investing with Wiley Fairchild. Judge Nixon called periodically to check if Mr. Ingram had discussed his request with Mr. Fairchild (Nixon Senate Tr. 244). Mr. Ingram felt "on the spot" about Judge Nixon's request and was reluctant to present the matter to Mr. Fairchild, to the point of avoiding the Judge's calls (Ingram Trial Tr. 1027-1029; Ingram House Tr. 345-346; Nixon House Tr. 422; Ingram Senate Tr. 178). However, Mr. Ingram ultimately approached Wiley Fairchild as requested and asked him to put the Judge into a "good deal." (Fairchild Senate Tr. 49; W. Fairchild Trial Tr. 492, 545; W. Fairchild House Tr. 154; Ingram House Tr. 347).

Wiley Fairchild had previously helped a former governor of Mississippi and the Mayor of Hattiesburg with investments so as to have "friends" in public office, and saw Judge Nixon as an influential man who might be able to help him in the future (W. Fairchild Trial Tr. 468, 493-494, 537-539, 546; W. Fairchild House Tr. 144-145, 156; Fairchild Senate Tr. 49).

Wiley Fairchild did not offer mineral interests to the general public. Rather, he purchased oil and gas leases and then developed wells and kept the profit. Judge Nixon knew Mr. Fairchild was not in the business of selling oil interests to the public at large (W. Fairchild Trial Tr. 494; W. Fairchild House Tr. 144; Fairchild Senate Tr. 48; Nixon House Tr. 475).

Wiley Fairchild searched his portfolio for oil and gas wells that would benefit Judge Nixon (W. Fairchild Trial Tr. 494; W. Fairchild House Tr. 158). Mr. Fairchild finally agreed to convey to the Judge partial interests in three wells, two in Mississippi and one in Alabama. Mr. Fairchild selected three wells that he felt would be profitable for the Judge. Mr. Fairchild was free to pick the wells he wanted and picked three of his best wells (W. Fairchild Trial Tr. 494-495; W. Fairchild House Tr. 155, 159; Fairchild Senate Tr. 49).

In the summer of 1979, Carroll Ingram told Judge Nixon that Wiley Fairchild would be "delighted" to put him in an investment. Judge Nixon contacted Mr. Ingram "a couple of times" thereafter to conclude the transaction, and was told that Wiley Fairchild "is the kind of man you cannot push. He will take his own sweet time" (Nixon House Tr. 422-423).

Pleased that Wiley Fairchild was willing to put him into an oil deal (Nixon Senate Tr. 244), Judge Nixon met Fairchild in early 1980 at the office of W.R. Fairchild Construction Company in Hattiesburg. At the meeting the two men reached a "gentlemen's agreement," although there was no negotiation over the price or other terms of the investment (Nixon House Tr. 423-424). Over the next year Judge Nixon telephoned Wiley Fairchild frequently, perhaps more than ten times (Nixon House Tr. 475-476; Nixon Senate Tr. 231).

In late February 1981, Mr. Fairchild directed Robert L. ("Skip") Jarvis, an employee in his office, to draw up documents conveying royalty interests in the three wells Fairchild had chosen for Judge Nixon (Jarvis Trial Tr. 279-282; W. Fairchild House Tr. 162-163). Mr. Fairchild did not identify the grantee and told Mr. Jarvis to leave the grantee portion blank (Jarvis Trial Tr. 282). Mr. Jarvis completed an initial draft of the conveyances and forwarded them to Carroll Ingram for review. Mr. Ingram returned the draft documents to Wiley Fairchild (Jarvis Trial Tr. 285; Ingram Trial Tr. 1040; Ingram House Tr. 365; House Ex. 4). Mr. Fairchild then instructed Mr. Jarvis to revise the draft documents by tripling the acreage to be sold to Judge Nixon and by backdating the documents a year (Jarvis Trial Tr. 286-288). During the first week of March, 1981, Mr. Jarvis prepared new documents with increased acreage, backdated to February 25, 1980 (Jarvis Trial Tr. 292; House Ex. 5).

By February 1981, when the documents were backdated, Wiley Fairchild's son Drew had been identified by federal authorities as a co-conspirator in a major marijuana smuggling effort at the Hattiesburg Airport (Phillips Trial Tr. 215-216; Weingarten House Tr. 8). The federal investigation that ultimately led to Judge Nixon's perjury convictions sought to determine, among other things, whether the backdating was part of an effort to cover up a bribe of the Judge in return for assistance in Drew Fairchild's drug troubles. (House Exs. 1 and 2).

In February 1981, Judge Nixon was presented with the backdated deeds and promissory notes. Although the notes were signed by Judge Nixon in February 1981, the notes purport to "witness execution this 25th day of February, 1980" (Nixon Senate Tr. 244; House Ex. 6). Judge Nixon signed the notes notwithstanding this inaccuracy.

Judge Nixon claims that the deeds were backdated upon the advice of Carroll Ingram, to conform to the approximate date of the "gentleman's agreement," i.e. when Wiley Fairchild first agreed to sell the interests to Judge Nixon (Nixon House Tr. 425; Nixon Senate Tr. 244). However, Judge Nixon's position concerning the effective date of his agreement with Wiley Fairchild is inconsistent with the Judge's repayment of the debt he owed to Fairchild Construction Company as part of the transaction. It was only in 1984, after Judge Nixon was aware that federal authorities were investigating the transaction and more than a year after he had fully repaid all principal and other interest owed to Fairchild, that Judge Nixon paid Fairchild interest for the period 1980-1981 (House Ex. 7).

Nor are Judge Nixon's annual Judicial Financial Disclosure Reports consistent with his testimony concerning the effective date of his investment. Judge Nixon claims that the agreement was effective in 1980, yet he failed to report the transaction on his 1980 Financial Disclosure Report. The transaction was reported for the first time on Judge Nixon's 1981 Financial Disclosure Report, but only in an amended report. Judge

Nixon's original 1981 report failed to mention the Fairchild transaction and was returned to him as inadequate (Subcomm. Ex. 26; Subcomm. Ex. 13, 3/2/89).

The investment with Mr. Fairchild was not available to the general public and was provided to Judge Nixon on highly favorable terms. Judge Nixon did not have to pay any money "up front" to finance his purchase of the royalty interests. Instead, Wiley Fairchild loaned Judge Nixon the entire purchase price of $9,500 (Nixon Senate Tr. 245).

In February 1981, when Judge Nixon was consummating the Fairchild transaction, the Judge was also entering into oil investments with other parties (Nixon House Tr. 426-427). To do so he borrowed $10,000 at 15% interest, the going market rate, repayable within 90 days, from The Mississippi Bank (Subcomm. Ex. 12, 3/2/89; Nixon Senate Tr. 245). However, Fairchild provided Judge Nixon with a $9,500 unsecured loan at only 10% interest, 5 points below the market rate, repayable over 3 years (House Ex. 6).

Conflicting testimony was presented at Judge Nixon's criminal trial as to the value of the mineral interests. Wiley Fairchild estimated the three mineral interests to be worth from $25,000-28,000 as of both the date he selected the wells and the date when the conveyances were finally prepared. In return for the conveyances, Wiley Fairchild wanted Judge Nixon to pay "something where it won't look like a hundred percent gift" (W. Fairchild Trial Tr. 506, 687; W. Fairchild House Tr. 168, 199-200).

Wiley Fairchild admitted he sold Judge Nixon interests that were "undervalued", and pled guilty to the crime of giving the Judge an illegal gratuity (W. Fairchild Trial Tr. 687; W. Fairchild House Tr. 183-184; House Exs. 11, 12 and 13).

An oil expert familiar with the wells testified on behalf of the government at Judge Nixon's trial that the mineral interests conveyed to the Judge were worth over $53,000 on February 25, 1981, and about $21,000 in February 1980 (Jackson Trial Tr. 1391-1393). In contrast, an expert called by Judge Nixon at trial testified that the $9500 price was fair market value (Massey Trial Tr. 1391-1393).

In his Senate testimony, Wiley Fairchild explained that he received less from Judge Nixon than what he could have obtained had he sold the interests on the open market (Fairchild Senate Tr. 68; W. Fairchild House Tr. 168). Mr. Fairchild described Judge Nixon's investment as "extremely good," and indicated that the deal was "unique," in that he has never been approached in such a manner at any other time (Fairchild Senate Tr. 50, 82).[9]

Wiley Fairchild met again with Judge Nixon in the late spring of 1981 after the mineral deeds had been delivered to the Judge by Mr. Ingram (W. Fairchild Trial Tr. 517; Ingram Trial Tr. 1067; Nixon House Tr. 430). On this occasion, Judge Nixon thanked

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[9] Judge Nixon acted improperly in accepting the investment from Wiley Fairchild because it was not available to the general public and was on favorable terms (Kaufman House Tr., 3/2/89, at 38; Canon 5(c)(4) of the Code of Judicial Conduct, reprinted at p. 417 of the House proceedings of March 2, 1989).

Mr. Fairchild for "putting him in a deal" and told him, ". . . if I can ever help you, I will and if I can't, I'll just tell you I can't" (Nixon Senate Tr. 245; Fairchild Senate Tr. 50). Judge Nixon concedes that he was grateful for the lucrative investment opportunity (Nixon Trial Tr. 1513, 1656-1657; Nixon House Tr. 430; Nixon Senate Tr. 248).

Judge Nixon began receiving royalty checks from Fairchild Construction Company in February 1982 (Jarvis Trial Tr. 295; W. Fairchild Trial Tr. 509; House Exs. 7 and 8). By the date of his criminal trial in early 1986, Judge Nixon had received over $60,000 from the three wells, which were expected to produce for another 12 to 20 years (W. Fairchild Trial Tr. 513). By January 24, 1989, Judge Nixon had received over $73,000 from the Fairchild investment, and continues to receive regular income from the investment (House Ex. 10). Judge Nixon paid back the $9,500 notes with interest after receiving royalty payments from Fairchild Construction Company in greater amounts, so that he was never out-of-pocket (Jarvis Trial Tr. 365-366; House Ex. 7).

Judge Nixon repaid much of his $9500 obligation to Fairchild Construction Company in advance of when payments were actually due (House Exs. 7 and 9). In his House testimony, Judge Nixon claimed he pre-paid his debt to Mr. Fairchild so as to "save on the interest" (Nixon House Tr. 431). Yet during the relevant time period Judge Nixon owed large sums to banks at 15% interest, and had also borrowed approximately $10,000 on a personal line of credit at 18% interest (Subcomm. Ex. 12, 3/2/89). From the standpoint of "saving on the interest," it made little sense for the Judge to pre-pay his 10% debt to Fairchild while he continued to bear interest charges on his bank loans at 15% and 18% (Nixon Senate Tr. 246). Although he denies it, the evidence shows that Judge Nixon's pre-payment of his debt to Fairchild was motivated by the Judge's desire to enhance his relationship with Fairchild (Nixon Senate Tr. 246-247).

Given the enormous success of his investment with Wiley Fairchild, Judge Nixon quite naturally was "enthusiastic" about the possibility of additional mineral transactions with Wiley Fairchild (Nixon Senate Tr. 248). In the fall of 1982 Mr. Fairchild mentioned to Judge Nixon the possibility of another investment (W. Fairchild Trial Tr. 603-605; Nixon House Tr. 432). Wiley Fairchild considered putting Judge Nixon into a "Board of Education" well in Simpson County, Mississippi and mentioned the deal to the Judge, but did not put the Judge into the deal because the well "turned out to be no good" (W. Fairchild Trial Tr. 519; Nixon Trial Tr. 1523; W. Fairchild House Tr. 176).

In his Senate testimony Judge Nixon suggested that he did not aggressively pursue other investments with Fairchild and spoke only once with Carroll Ingram about other possible investments (Nixon Senate Tr. 247-249). In contrast, Ingram testified that he had "occasional" conversations and personal visits with Judge Nixon concerning other Fairchild investments. Ingram confirmed that Judge Nixon "certainly" was interested in other deals with Fairchild (Ingram Senate Tr. 167).

Thus, by mid-1982, and at the time of his fateful meeting with Wiley Fairchild when Fairchild complained about the handling of his son Drew's drug smuggling case, Judge Nixon was grateful to Wiley Fairchild for the valuable oil investment. Unlike Judge Nixon's other outside investments, which either lost money or only broke even, the Fairchild investment was generating a stream of income (Nixon Senate Tr. 248). Judge Nixon was enthusiastic about the possibility of further investments with Wiley Fairchild, and had promised to help Fairchild if he could (Nixon Senate Tr. 245, 248).

2. The Drew Fairchild Drug Smuggling Case

On August 4, 1980, an airplane with 2,200 pounds of marijuana was seized by federal and local drug enforcement agents at the Hattiesburg Municipal Airport (D. Fairchild Trial Tr. 111; Phillips Trial Tr. 213; Weingarten House Tr. 7). Arrests were made at the scene and on August 19, 1980 an indictment was returned in federal court against three of the smugglers. Drew Fairchild, Wiley Fairchild's 50 year-old son, was a participant in the smuggling conspiracy but was not prosecuted at that time (Phillips Trial Tr. 214-215; Weingarten House Tr. 8; House Ex. 14).

Shortly after the indictment of the smugglers, Drew Fairchild and his lawyer, Bill Porter, approached Forrest County District Attorney Paul H. "Bud" Holmes to discuss Drew's legal situation (D. Fairchild Trial Tr. 139-141; Holmes Trial Tr. 786-787; Holmes House Tr. 235-236). Mr. Holmes sent them to George Phillips, United States Attorney for the Southern District of Mississippi, who was overseeing the federal prosecution of the drug case (D. Fairchild Trial Tr. 141-142; Holmes Trial Tr. 730-731, 787; Holmes House Tr. 236).

As a result of discussions with the U.S. Attorney's office, on November 19, 1980 Drew Fairchild agreed to plead guilty to felony charges, pay a $15,000 fine, and receive a sentence of 5 years probation in return for cooperating with the government in the drug case (D. Fairchild Trial Tr. 114-115; Phillips Trial Tr. 217; Weingarten House Tr. 8; House Ex. 15). Drew Fairchild was subsequently debriefed by agents working with the U.S. Attorney's office, who concluded that Drew was not being completely cooperative. The U.S. Attorney's office determined, therefore, that Drew Fairchild would be prosecuted for his involvement in the drug smuggling conspiracy (D. Fairchild Trial Tr. 148-149; Phillips Trial Tr. 219-220, 238; Weingarten House Tr. 8).

In March, 1981 Bill Porter sued Drew Fairchild to collect a $10,000 legal fee in connection with his representation of Drew in the drug case (D. Fairchild Trial Tr. 151; Subcomm. Ex. N-2). Approximately one quarter of the fee was paid by Wiley Fairchild on July 3, 1981, but Mr. Porter complained to Bud Holmes about his inability to collect the full fee from Drew (D. Fairchild Trial Tr. 154-155; W. Fairchild Trial Tr. 475; Holmes Trial Tr. 838; W. Fairchild House Tr. 150; Defense Trial Ex. 2).

The local Forrest County grand jury asked Mr. Holmes to find out what had happened in connection with the airport drug bust (Holmes Senate Tr. 94). Mr. Holmes thereafter called U.S. Attorney Phillips and discussed the status of Drew's case. Mr. Holmes learned that Drew Fairchild had not cooperated with Federal authorities, and Mr. Phillips agreed that Mr. Holmes could take over the case and indict Drew Fairchild on state drug charges (Holmes Senate Tr. 94). Mr. Holmes assumed control over Drew's case both to carry out his law enforcement duties and to help his friend Bill Porter collect the full fee (Holmes Senate Tr. 94; Holmes Trial Tr. 732-34, 835-844; Phillips Trial Tr. 220-221; Holmes House Tr. 237). In his Senate testimony, Mr. Holmes stated that because the evidence against Drew Fairchild was very strong and a felony had been committed, he decided to present an indictment to the grand jury (Holmes Senate Tr. 95).

On August 26, 1981 the Forrest County grand jury returned the indictment against Drew Fairchild and Robert Watkins, the pilot in the drug-smuggling conspiracy (D. Fairchild Trial Tr. 116, 156; Holmes Trial Tr. 846-847; Holmes House Tr. 239; House Ex. 16). Mr. Watkins was then a fugitive. Drew Fairchild was arraigned on September 3, 1981 with his attorney, Bill Porter, present (Govt. Trial Ex. 6). Mr. Porter demanded the remainder of his $10,000 fee "up front." In order to obtain the money, Wiley Fairchild made his son Drew turn over numerous oil leases owned by Drew. Wiley Fairchild then paid Mr. Porter the remainder of the fee (D.

Fairchild Trial Tr. 157-163; W. Fairchild Trial Tr. 477, 614-615; W. Fairchild House Tr. 206; Subcomm. Ex. 6).

In December, 1981 Robert Watkins was apprehended in Texas. This spurred negotiations between Drew Fairchild, his counsel and District Attorney Holmes. Drew Fairchild entered a guilty plea to the state charges on January 12, 1982 (Holmes Senate Tr. 95; D. Fairchild Trial Tr. 118, 166; Holmes Trial Tr. 735; Holmes House Tr. 240-241; House Ex. 17). Messrs. Holmes and Porter orally agreed that if Drew cooperated against Robert Watkins, Drew would receive five years probation and a $5,000 fine, with sentencing to occur after the prosecution of Mr. Watkins was completed (Holmes House Tr. 240-241). Wiley Fairchild believed that with this plea agreement and his fee payment to Mr. Porter, he would be troubled no more by his son's case (W. Fairchild Trial Tr. 474-476, 479, 623, 624).

Drew Fairchild's sentencing was scheduled for March 19, 1982, but was delayed due to his back surgery. In May 1982 Robert Watkins failed to appear at a scheduled hearing and his bond was revoked. Drew Fairchild's case was continued through the summer of 1982. In October 1982 Mr. Watkins was apprehended in Florida, and extradition proceedings began. Drew's sentencing was continued again in November 1982 because Mr. Watkins had been apprehended (Holmes Senate Tr. 96; D. Fairchild Trial Tr. 118, 168, 171; Weingarten House Tr. 9; Holmes House Tr. 242-243; House Ex. 18).

On December 23, 1982, pursuant to a motion prepared at the direction of Bud Holmes, Drew Fairchild's drug case was "passed to the file" (House Ex. 19). As a matter of local practice, this meant that Drew's case was put on the inactive list, an unprecedented disposition for a defendant who had pled guilty (Holmes Senate Tr. 96; Ingram Senate Tr. 164; Weldy Trial Tr. 1305). With his case passed to the files, Drew Fairchild would suffer no adverse consequences of any kind and would not even have to pay the fine or serve probation as contemplated under the plea agreement (Holmes Senate Tr. 96; Ingram Senate Tr. 164; Holmes House Tr. 247-248). Wiley Fairchild was "proud" and "pleased" with the passing of his son's case to the file (Fairchild Senate Tr. 59).

Judge Nixon played a vital role in the passing of the Drew Fairchild drug smuggling case to the file. The case was passed to the file because of three events that took place on a single day -- a meeting between Wiley Fairchild and Judge Nixon at Fairchild's office, a meeting between District Attorney Holmes and Judge Nixon at Mr. Holmes' farm, and a telephone call that same evening involving Judge Nixon, Holmes and Wiley Fairchild concerning Drew's case (Holmes Senate Tr. 97-102; Fairchild Senate Tr. 53-54, 80, 88). Had it not been for Judge Nixon's involvement, the Drew Fairchild drug smuggling case would never have been passed to the file (Holmes Senate Tr. 102; Holmes House Tr. 253; Fairchild Senate Tr. 88; Ingram Senate Tr. 165, 167).

In early January, 1983 Forrest County Circuit Court Judge Dickie McKenzie took office after defeating the incumbent, Judge Jack Weldy, in an election (McKenzie Trial Tr. 1310). Judge

McKenzie observed that the Drew Fairchild case had been passed to the file, expressed his concern about what had occurred, and the matter was reported in the local news media (Holmes Senate Tr. 104-105; McKenzie Trial Tr. 1310-1318; Holmes House Tr. 258). Robert Watkins was returned to Hattiesburg and arraigned on January 26, 1983. On that same date, only one month after passing the case to the file, Mr. Holmes reinstated Drew's case to the active docket because of negative publicity resulting from the passing of Drew's case to the file (Holmes House Tr. 258).

3. Judge Nixon's Involvement in the Drew Fairchild Drug Case

Wiley Fairchild felt he was being blackmailed in connection with his son's case because of the disparate treatment of Robert Royals, Drew's co-manager at the airport and a participant in the smuggling conspiracy (Fairchild Senate Tr. 52, 79-80; Fairchild Trial Tr. 479; Fairchild House Tr. 176-177). Although he was just as guilty as Drew, Royals had not been prosecuted by federal or state authorities. Mr. Royals told Wiley Fairchild that Bill Porter had said Wiley should "get off his money" to help Drew, who had his "tail in a crack" (W. Fairchild Trial Tr. 480, 621-623; W. Fairchild House Tr. 177, 205-206; Fairchild Senate Tr. 52).

Convinced that Bud Holmes and possibly others were blackmailing him in connection with his son's case, and looking for equal justice in the treatment of his son vis-a-vis Robert Royals, Wiley Fairchild sought help from Judge Nixon. Mr. Fairchild telephoned Judge Nixon and, when the Judge was unavailable, left a message asking the Judge to stop by the W. R. Fairchild Construction Company office in Hattiesburg (W. Fairchild Trial Tr. 481-483; W. Fairchild House Tr. 177; Fairchild Senate Tr. 52-53).

Wiley Fairchild sought out Judge Nixon because he "wanted to talk to him [Judge Nixon] about my son's case" (Fairchild Senate Tr. 53). Mr. Fairchild called upon Judge Nixon because of the Judge's previous offer of help -- ". . . if I can ever help you I will and if I can't, I'll just tell you I can't" -- and because he knew Judge Nixon and Mr. Holmes were very good friends (W. Fairchild Trial Tr. 481-482; W. Fairchild House Tr. 177-178). Mr. Fairchild believed that "friends help friends," and felt that Judge Nixon owed him a favor after the oil deal (Fairchild Senate Tr. 53).

Judge Nixon visited Wiley Fairchild's office in Hattiesburg for a fifteen or twenty-minute meeting. At the meeting, Wiley Fairchild told the Judge he was being blackmailed by Mr. Holmes and possibly Carroll Ingram concerning the handling of Drew's drug case (Fairchild Senate Tr. 54; W. Fairchild Trial Tr. 484; W. Fairchild House Tr. 177-178; Nixon House Tr. 433-434). Mr. Fairchild emphasized the unfairness of his son's predicament compared to the treatment of Robert Royals. Wiley Fairchild told Judge Nixon, "...if they will go ahead and prosecute Bob Royals they won't hear a damn word out of me. He's guilty and my son's guilty, but I just don't like them picking on my son because I got money" (W. Fairchild Trial Tr. 480-482, 484, 640-643; W. Fairchild House Tr. 177-178; Fairchild Senate Tr. 80).

During the meeting, Wiley Fairchild discussed his son's case with Judge Nixon (Fairchild Senate Tr. 56, 79, 83). Mr. Fairchild is certain that his meeting with Judge Nixon occurred before the Drew Fairchild case was passed to the files (W. Fairchild Trial Tr. 481-483, 486, 660-661, 667, 670-672, 718-719; Fairchild Senate Tr. 55). During the meeting, Judge Nixon gave Wiley Fairchild the impression that he would talk to Bud Holmes about the Drew Fairchild case (Fairchild Senate Tr. 54).

Just as Wiley Fairchild hoped, that very afternoon Judge Nixon went to Bud Holmes' office. Mr. Holmes believes that this occurred on May 14, 1982. Mr. Holmes bases his recollection upon unrelated events, particularly a wedding ceremony he attended in Jackson, Mississippi the following day (Holmes Senate Tr. 103-104; Holmes Trial Tr. 737, 874, 877, 883, 900, 906, 908, 947; Holmes House Tr. 255-256). A marriage certificate corroborates Mr. Holmes' recollection of May 14, 1982 as the probable date (House Ex. 15). More important, telephone records confirm Judge Nixon's presence in Holmes' office on the afternoon of May 14, 1982 (House Ex. 42).

Mr. Holmes has repeatedly stated that his meeting with Judge Nixon could well have been another date (Holmes Senate Tr. 104; Holmes Trial Tr. 876-877; Holmes House Tr. 301-302). Visitor logs from the Forrest County District Attorney's office reflect

Judge Nixon's presence at Mr. Holmes' office on May 13, 1982, as well as June 24, July 16, and October 20 of that year (Holmes Trial Tr. 751; House Ex. 21). Whatever the specific date, Holmes' meeting with Judge Nixon took place before the Drew Fairchild case was passed to the files in December 1982 (Holmes Senate Tr. 104).

Mr. Holmes and Judge Nixon had a couple of drinks at the District Attorney's office and then drove to Mr. Holmes' farm outside Hattiesburg (Holmes Senate Tr. 97; Holmes Trial Tr. 736, 742-748; Holmes House Tr. 244). During the drive Judge Nixon told Holmes that Wiley Fairchild had asked him [Judge Nixon] to "put in a good word" for Drew Fairchild (Holmes Senate Tr. 97; Holmes Trial Tr. 736-737). Judge Nixon said he did not want Mr. Holmes to do anything against his oath of office, but told Holmes that Mr. Fairchild had "asked me [Judge Nixon] to put in a good word" (Holmes Senate Tr. 97; Holmes Trial Tr. 736-737). Judge Nixon also told Holmes during the drive out to the farm that he was "thinking about doing some more investments" with Wiley Fairchild and was pleased with the existing investment (Holmes Senate Tr. 98; Holmes Trial Tr. 736-737, 744-745, 920; Holmes House Tr. 246). Judge Nixon was trying to "ingratiate" himself with Wiley Fairchild by "putting in a good word" for Drew Fairchild (Holmes Senate Tr. 102; Holmes House Tr. 251-252).

Mr. Holmes reacted to these statements from his friend Judge Nixon by asking, "What does the man want -- an apology?" When Judge Nixon reiterated that he was simply "putting in a good word" and not asking for anything, Mr. Holmes responded, "... hell, I'll just pass it to the file." (Holmes Senate Tr. 97, 99; Holmes Trial Tr. 736-738; Holmes House Tr. 246-247).

"Passing the case to the file" in Mississippi procedure involves the transfer of the case from the active to inactive docket. Prior to the Drew Fairchild case, there had never been a case where a defendant had pled guilty but the case was nevertheless passed to the file. By telling Judge Nixon he would pass the case to the file, Holmes was describing a disposition for Drew Fairchild that was better than the plea agreement previously reached. Passing the case to the file was tantamount to a dismissal with no fine, no probation and no other adverse consequence to Drew Fairchild (Holmes Senate Tr. 96, 99-100, 152; Ingram Committee Tr. 374-375).

The reason Bud Holmes told Judge Nixon he would pass the case to the file was "to make Judge Nixon look like a hero" (Holmes Senate Tr. 100). Although Judge Nixon did not ask for anything, the Judge tried to influence Holmes in a subtle way, and Holmes volunteered to pass the case to the file to "pick up some brownie points" for Judge Nixon (Holmes Senate Tr. 146).

After they arrived at the farm, Bud Holmes and Judge Nixon had more drinks and continued to talk about the Drew Fairchild case. Mr. Holmes told Judge Nixon about the oral plea agreement already negotiated with Bill Porter, calling for probation and a fine in exchange for Drew's cooperation. (Holmes Senate Tr. 101, 154). Judge Nixon asked if Wiley Fairchild knew his son wasn't going to jail (Holmes Senate Tr. 101, 146, 154).

Judge Nixon then telephoned Wiley Fairchild (Holmes Senate Tr. 101; Holmes Trial Tr. 739; Holmes House Tr. 246, 249).

Wiley Fairchild confirmed that he received a telephone call from Judge Nixon around seven o'clock that night (Fairchild Senate Tr. 54; W. Fairchild Trial Tr. 485; W. Fairchild House Tr. 178-179). Mr. Fairchild had been drinking that evening but remembers the event because he was "glad to get the call" and learn that "things would be all right" with Drew (W. Fairchild Senate Tr. 54; W. Fairchild Trial Tr. 649-650; W. Fairchild House Tr. 179).

Mr. Fairchild testified that Judge Nixon said, "Wiley, you know that man you was talking about seeing?... I'm at his house, and everything's going to be taken care of to your satisfaction." (Fairchild Senate Tr. 54). After Mr. Fairchild thanked Judge Nixon, Bud Holmes got on the line and said, "Wiley, when this man asks me to do something, I don't ask no questions. I just go ahead and do it." (W. Fairchild Senate Tr. 54; W. Fairchild Trial Tr. 485, 650; W. Fairchild House Tr. 178-179, 306).

Wiley Fairchild specifically recalls that Judge Nixon was on the phone first (Fairchild Senate Tr. 54; W. Fairchild Trial Tr. 529, 649). Mr. Fairchild testified that this call made him very happy because it meant that his son's case was "done away with once and for all" (W. Fairchild Trial Tr. 489). After receiving the phone call from Judge Nixon, Mr. Fairchild thought his son's case would be passed to the file (Fairchild Senate Tr. 55).

Mr. Holmes' recollection of the phone call was virtually identical to Wiley Fairchild's -- that Judge Nixon placed the call and told Mr. Fairchild, "The man that we were talking about, I'm at his farm. I have good news. Your son isn't going to jail." (Holmes Senate Tr. 101; Holmes Trial Tr. 739-740, 929-930; Holmes House Tr. 249). According to Mr. Holmes, Judge Nixon then went on to thank Wiley Fairchild for his friendship and the investment opportunity (Holmes Senate Tr. 101). Mr. Holmes testified that he then took the phone and told Mr. Fairchild that "when Judge Nixon asked me to do something, I'm glad to try to do it." (Holmes Senate Tr. 101; Holmes Trial Tr. 740, 933; Holmes House Tr. 249-250).

Even Judge Nixon concedes that, "[i]n his telephone conversation with Judge Nixon, Wiley Fairchild thanked Judge Nixon for speaking with Mr. Holmes about the handling of Drew Fairchild's case and told Judge Nixon, I'm satisfied" (House Ex. 41, Stipulation No. 71; Nixon Senate Tr. 254).

Mr. Fairchild felt "proud" that his son's case had been passed to the files (Fairchild Senate Tr. 59). Based upon his meeting and subsequent telephone conversation with Judge Nixon, Mr. Fairchild "figured what had happened is what did happen" -- that the charges against Drew were dropped because of Judge Nixon's involvement (Fairchild Senate Tr. 80, 88).

Carroll Ingram learned of Judge Nixon's conversations with Bud Holmes and Wiley Fairchild concerning the Drew Fairchild case from all three participants--Wiley Fairchild, Bud Holmes and Judge Nixon himself (Ingram Trial Tr. 1068, 1070, 1075; Ingram House Tr. 374-375). In the fall of 1982, Wiley Fairchild told

Ingram that he (Fairchild) had asked Judge Nixon to talk to Bud Holmes about Drew's case, that Judge Nixon had talked to Mr. Holmes and that the results were "positive" such that "Drew Fairchild's case was going to be okay" (Ingram Trial Tr. 1068, 1155; Ingram House Tr. 375). In his Senate Committee testimony, Mr. Ingram confirmed that Wiley Fairchild was pleased that Judge Nixon had spoken with Bud Holmes about Drew Fairchild's case. (Ingram Senate Tr. 165).

Mr. Ingram also described for the Senate an important telephone conversation he had with Judge Nixon, in which Judge Nixon specifically told Ingram that he [Judge Nixon] had talked to Bud Holmes about the Drew Fairchild case (Ingram Senate Tr. 165).

In this revealing telephone conversation, Judge Nixon told Ingram that he (Nixon) had talked to Bud Holmes about the Drew Fairchild case because Wiley Fairchild had asked him to do so (Ingram Senate Tr. 166; Ingram Trial Tr. 1070, 1145, 1188-1190; Ingram House Tr. 375). Judge Nixon told Ingram that he had spoken with Holmes as requested and that Holmes' reaction was "positive", such that Drew's case "was okay, that there was not anything going to happen in Drew Fairchild's case" (Ingram Senate Tr. 166; Ingram Trial Tr. 1190). Corroborating Bud Holmes, and based upon his conversation with Judge Nixon, Mr. Ingram testified that Judge Nixon essentially "put in a good word" for Drew Fairchild (Ingram House Tr. 388, 412).

Mr. Ingram's conversation with Judge Nixon occurred during the same time the Judge and Wiley Fairchild were discussing additional mineral transactions. Ingram verified that "certainly Judge Nixon was interested in making other investments with Mr. Fairchild" (Ingram Senate Tr. 167; Ingram Trial Tr. 1071-1072).

Further corroborating the testimony of Wiley Fairchild and Bud Holmes, Mr. Ingram told the Committee that he associates the passing of Drew Fairchild's case to the files with Judge Nixon's involvement in the case (Ingram Senate Tr. 165). Consistent with the testimony of Holmes and Fairchild, Ingram recalls that Judge Nixon's involvement took place before the Drew Fairchild case was passed to the files (Ingram Senate Tr. 166).

Following his meeting with Judge Nixon and the telephone call to Wiley Fairchild from the farm, District Attorney Holmes let Drew Fairchild's case "just sit" until he passed the case to the file in late 1982 at the end of Judge Weldy's term (Holmes Trial Tr. 751; Holmes House Tr. 253). While Judge Nixon did not specifically ask Bud Holmes to pass the case to the file, the Judge's "putting in a good word for Drew ... caused enough influence on me [Holmes] to go ahead and do what I did" (Holmes Trial Tr. 751-754, 938-944). But for Judge Nixon's intervention, Holmes would not have passed the Drew Fairchild case to the file in December 1982 (Holmes Senate Tr. 102, 146; Holmes House Tr. 253, 275, 311).

During his Senate testimony, Wiley Fairchild succinctly explained the significance of Judge Nixon's involvement in the drug case:

> SENATOR WIRTH: Let me ask you a final question. In answer to Senator Danforth's questions, you said, "I figured what had happened is what did happen." What did you think actually happened on this thing? What has happened? What went on, when you say you figure what happened did happen?
>
> MR. FAIRCHILD: What did happen?
>
> SENATOR WIRTH: What did happen, do you think?
>
> MR. FAIRCHILD: Well, Drew's case was passed to the file.
>
> SENATOR WIRTH: Why was Drew's case passed to the file?
>
> MR. FAIRCHILD: Well, because Judge Nixon told Bud Holmes what I've said.
>
> SENATOR WIRTH: And why did Judge Nixon do that, say that?
>
> MR. FAIRCHILD: Well, me and him have become what I think not real close friends, but friends, somebody that I thought wanted to do what's right. I didn't know whether they were going to prosecute Bob Royals, I didn't know whether they were going to drop the case with Drew, but that's what happened, they dropped the case against Drew. They passed it to the file.
>
> (Fairchild Senate Tr. 88)

The significance of Judge Nixon's involvement was also highlighted by the testimony of other witnesses at Judge Nixon's trial. Glen White, who is presently Forrest County District Attorney and previously served as Mr. Holmes' assistant, was familiar with Drew's case and prepared the actual order signed on December 23, 1982 passing the case to the file. Mr. White testified that the reasons cited by Mr. Holmes in the order passing the Fairchild case to the file were inaccurate (White Trial Tr. 1277-1280). Mr. White also testified that after Mr. Holmes' indictment but before he pled guilty, Holmes told White that he had passed the Drew Fairchild case to the file because of Judge Nixon's involvement (White Trial Tr. 1283-1284). Judge Weldy, who signed the order, testified that he knew of no other instance when a case had been passed to the file after a guilty plea (Weldy Trial Tr. 1305).[10]

4. The FBI/Department of Justice Interview Of Judge Nixon on April 19, 1984

On November 3, 1983 an anonymous caller telephoned the Federal Bureau of Investigation claiming there was an improper relationship between Wiley Fairchild and Judge Nixon. The caller suggested that Wiley Fairchild may have conveyed mineral interests to Judge Nixon as a bribe for favorable treatment in Drew Fairchild's drug case, and urged the FBI to investigate both the Nixon-Fairchild investment and the strange handling of the Drew Fairchild drug case. The informant ultimately identified himself as Robert Jarvis, a former employee of Wiley Fairchild and presently an Assistant State's Attorney in Florida (Jarvis Trial Tr. 296-298, 300, 306-308, 315-319, 340, 347, 357-358).

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[10] Judge Nixon yet again breached minimal standards of conduct for a federal judge through his behind-the-scenes involvement in the Drew Fairchild drug case. Unlike Members of Congress, federal judges have no constituents and are not supposed to act on behalf of private interests. Two well-known experts in the field of judicial ethics, Professors Andrew Kaufman of Harvard Law School and Steven Lubet of Northwestern School of Law, have testified that Judge Nixon's contacts with Bud Holmes and Wiley Fairchild violated Canon 2 of the Code of Judicial Conduct (Lubet House Tr., 3/2/89, at 19-20; Kaufman House Tr., 3/2/89, at 41-43; Canon 2 is reprinted at p. 415 of the House proceedings of March 2, 1989). Professors Kaufman and Lubet agree that Judge Nixon improperly used the prestige of his judicial office for private gain of the Fairchilds by talking with Bud Holmes and Wiley Fairchild about the drug case.

During the subsequent investigation conducted by the FBI and the Public Integrity Section of the Department of Justice, Mr. Jarvis recorded a meeting with Wiley Fairchild, in which Mr. Fairchild maintained that there was nothing illicit about his relationship with Judge Nixon but admitted that "certainly I'd rather do something for a judge or a prosecuting attorney. No, a judge. I'd rather do something for them than the average fellow. Because they're the ones who can help you if you ever need it" (Nixon Ex. 25, p. 31).

Early during the investigation, an attorney from the Department of Justice and an FBI agent interviewed Judge Nixon in his chambers in Biloxi, Mississippi on April 19, 1984. The interview was tape-recorded with the Judge's full consent (White-Spunner Senate Tr. 18-19). Judge Nixon was advised prior to and during the interview that the investigation was examining his investment with Wiley Fairchild and the unusual handling of the Drew Fairchild drug case (House Ex. 1).

During the interview Judge Nixon failed to tell the truth but instead repeatedly denied, in the broadest possible terms, any knowledge of or participation in Drew Fairchild's case:

> **Q. Did he [Wiley Fairchild] have anything on his mind that he wanted with you -**
>
> **Judge Nixon: You'd have to ask him because he's never asked --**
>
> **Q. I mean, did --**

Judge Nixon: Anything that or demanded anything. Of course, anything to do with his [Fairchild's] son's case absolutely had nothing whatsoever, 'cause I don't, I'm not even aware of really what that's about. I think I read something in the paper one time about it since then.

Q. Did you --

Judge Nixon: But if you can --

Q. Detect anything --

Judge Nixon: If you can detect or know of anything at all where I ever had any connection with his son's case or the disposition of it or handling of it or anything to do with it, I sure wish you'd tell me, and I'll --

Q. I, well, I --

Judge Nixon: Because there has --

Q. I can assure you, we have no information to that effect --

Judge Nixon: There has, because there has been nothing.

Q. No, I, I guess what I'm asking you is whether or not you detected anything untoward from either --

Judge Nixon: Abso --

Q. Mr. Fairchild --

Judge Nixon: Absolutely not. If I had, I'da pulled back immediately and wouldn't have had a darn thing to do with it.

(House Ex. 1, p. 19-20)

* * * *

Q. Was there any other possible business that you discussed with him [Wiley Fairchild] other than these three wells? In mean, would --

Judge Nixon: Not to my knowledge. I certainly never discussed anything about his son's case.

(House Ex. 1, p. 25)

* * * *

Q. From the time of that bust until ba-basically me talking to you about the case --

Judge Nixon: Uh-huh --

Q. You've had no connection, no knowledge of it, no participation in --

Judge Nixon: Correct --

Q. The Drew Fairchild case?

Judge Nixon: Absolutely, except something I read in the paper. It was either an editorial or state, or, or news article or something, a few years ago, I think -

(House Ex. 1, p. 31)

* * * *

Q. Do you recall any knowledge of the case, meaning the Fairchild case, while you were dealing with Wiley Fairchild?

Judge Nixon: No.

Q. And he certainly never brought it up?

Judge Nixon: Not to my recollection. I think I would recall that.

(House Ex. 1, p. 32)

* * * *

Q. Does he [Drew Fairchild] work with his father?

Judge Nixon: I have no idea. Didn't even know he existed, except from what I read about that and what you just told me. Absolutely no.

(House Ex. 1, p. 33)

* * * *

Q. I mean, I, our earnest desire is to wrap this end of it --

Judge Nixon: I understand --

Q. Completely, and often times judges are victimized by others --

Judge Nixon: Yeah, well, I don't --

Q. I mean, you're a savvy guy. You know that this happens.

Judge Nixon: Well, I don't know about that part of it, but all I know is ah nothing was done or nothing was ever mentioned about Wiley Fairchild's son, and I defy anybody to, and I say defy, I don't mean (unintelligible), but I challenge anybody to show any connection or anything I've ever done in connection with Wiley Fairchild's son's case I certainly would (unintelligible) to begin with. And if I even suspected something like that was going on, I certainly wouldn't have ah invested or have any dealings, absolutely.

(House Ex. 1, p. 36-37)

* * * *

Q. Believe me. At this point we're not suggesting that there was impropriety in the U.S. Attorney's office or that there was impropriety by Mr. Holmes. I mean, we have an allegation, and always in these cases our fervent hope that there's a logical, reasonable, legitimate explanation for all of these events. And, and we're at the inception of it, and one of the reasons we came to you is because we're not gonna be scurrying around your neighborhood and not tell you about it--

Judge Nixon: Right. Well, I'm puzzled. I, I just don't know anything about it. I, I'm, I'm, I'm learning something about it now.

Q. Okay, so I'm -- Just to complete the picture --

Judge Nixon: That's what I was, that's what I wanted to ask you, what allegation -- I've never heard, you know, never had the [Drew Fairchild] case never heard about the case except what I told you, and ah certainly had nothing to do with it.

(House Ex. 1, p. 43)

* * * *

Judge Nixon: I understand, but regardless, what connection have I had with ah Fairchild's son's case? Isn't that the bottom line?

Q. It, it basically --

Judge Nixon: I mean --

Q. Could well be the bottom line.

Judge Nixon: Yeah, what, what --

Q. And that's why --

Judge Nixon: Could I have conceivably done?

Q. Well, that's why I had to ask you --

Judge Nixon: To influence the case? Ah, I certainly didn't do a thing in the world. I don't know a thing about -- But what could I have done?

Q. Well, I mean, I don't know what you could have done. I mean it --

Judge Nixon: As United States District Judge.

Q. If someone wanted to use their imagination, I suppose they, they could think of things, and, and I, that's why we ask you the question did Bud Holmes ever talk to you about the case?

Judge Nixon: Oh, no.

(House Ex. 1, p. 47-48)

During the April 1984 interview Judge Nixon did not reveal that Wiley Fairchild complained to him about unequal justice and being "blackmailed" by Bud Holmes in connection with the Drew Fairchild drug case. Judge Nixon did not disclose his visit to Bud

Holmes' farm and subsequent telephone conversation with Wiley Fairchild concerning Drew's case. Nor did Judge Nixon reveal his later telephone conversation with Carroll Ingram concerning the Drew Fairchild case. Instead, Judge Nixon repeatedly and categorically denied any knowledge or involvement whatsoever concerning Drew Fairchild and the drug case (House Ex. 1).

5. Judge Nixon's Sworn Testimony Before The Grand Jury on July 18, 1984

In the summer of 1984, a special federal grand jury was empaneled in Hattiesburg to investigate possible criminality associated with the Fairchild-Nixon investment and the handling of the Drew Fairchild drug prosecution. Judge Nixon retained counsel prior to his grand jury appearance, and was represented by counsel at the time of his testimony.

During the three months prior to his grand jury testimony, Judge Nixon spoke with Holmes and Ingram about the investigation, assembled documents concerning his investment with Fairchild, obtained and reviewed the transcript of his April 1984 interview, consulted with counsel, and prepared a written statement for the grand jury in anticipation of his grand jury appearance (Nixon Senate Tr. 274-276; Nixon House Tr. 517). Judge Nixon asked for the opportunity to appear before the grand jury and testified under oath on July 18, 1984, the first day the grand jury was convened.

Judge Nixon was convicted of one count of making a false declaration before the grand jury,[11] a felony and a form of perjury, for the following testimony before the grand jury:

> Q. The grand jury has heard evidence that the prosecutor, the state prosecutor, who eventually handled the case was an individual named Bud Holmes. Is he a friend of yours?
>
> A. Very good friend of mine, long time friend, yes.
>
> Q. Did he ever discuss the Drew Fairchild case with you?
>
> A. No, not to the best of my recollection. I think I would recall if he had.
>
> (House Ex. 2, p. 47-48)

The jury also found Judge Nixon guilty of making a second false declaration based on the following grand jury testimony:

> Q. All right. Judge, do you have anything you want to add?
>
> THE WITNESS: Yes, I do.
>
> I want to say this. I -- Here (indicating) are your notes too, copies of your instruments, rather.
>
> I came here voluntarily and am very happy to cooperate with this grand jury and give them all the information that I have and that I could. And I have always thought everyone should do that, and that goes for the grand jury

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[11] 18 U.S.C. Section 1623 provides that "Whoever under oath . . . in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration . . . shall be fined not more than $10,000 or imprisoned not more than five years, or both." In order to convict Judge Nixon of this form of perjury, the jury was required to find beyond a reasonable doubt that Judge Nixon's grand jury testimony was false, and that Judge Nixon knew his testimony was false. See United States v. Nixon, 816 F.2d 1022, 1029 (5th Cir. 1987) (House Ex. 32).

> **over which I'm supervising now, the other federal grand jury that's sitting at this time. I have nothing at all to -- had nothing to hide or nothing to withhold and I brought everything that you asked me to bring.**
>
> **And I want to say this. That I've been told and led to believe and read in the newspaper and heard on the news media so much about this is an investigation of the Drew Fairchild criminal case. Now, I have had nothing whatsoever officially or unofficially to do with the Drew Fairchild criminal case in federal court or state court. I don't need to reconstruct anything with reference to that. I've told you that from the beginning.**
>
> **I have never talked to anyone about the case, any federal judge or state judge, federal prosecutor or state prosecutor, and I never handled any aspect of this case in federal court. As you said, Judge Cox handled it. I don't know where -- someone told me maybe Judge Russell handled one of the other defendants also and -- but I never handled any part of it, never had a thing to do with it at all, and never talked to anyone, state or federal, prosecutor or judge, that in any way influenced anybody with respect to this case. Didn't know anything about it until I read that account in the newspaper. Didn't even know Mr. Fairchild had a son when I was dealing with him in the business transaction.**
>
> **So I want to say that because I understand that's what this is all about. The investigation is apparently, if the news media is correct, and if I understand it correctly, that's what this is about, the Drew Fairchild criminal case.**
>
> **(House Ex. 2, p. 75-77)**

Judge Nixon's closing statement to the grand jury was not spontaneous, but was prepared in writing by Judge Nixon prior to his grand jury appearance (Nixon House Tr. 517).

In addition to the foregoing grand jury testimony that was the focus of criminal charges and led to his convictions, Judge Nixon described to the grand jury his meetings with Wiley Fairchild as follows:

Q. If the first meeting [with Wiley Fairchild] produced the deal, what would the other meetings have been for?

A. I met with him several times. One time he told me that he thought he was over -- maybe overcharging me for these and would maybe put me in another later. He mentioned something about the name of a well was -- I don't know, remember when this was -- it had something to do with the name School in the property. But he never did and there never was any mention of it.

And, as I say, I don't know of any reason I would have met with him after the transaction was finalized in the first part of 1981, but I can't say for sure. It's possible.

You're asking me about -- I -- I don't like to keep repeating it -- but three or four years ago, and I'm trying to reconstruct this to the best of my recollection and knowledge.

(House Ex. 2, p. 56)

Thus, as he had done in his April interview, during his grand jury testimony Judge Nixon failed to disclose his conversations with Wiley Fairchild, Bud Holmes and Carroll Ingram concerning the Drew Fairchild matter. Judge Nixon instead vehemently and repeatedly denied any knowledge whatsoever of Drew Fairchild and the drug case.

6. The Cover-Up of Judge Nixon's Involvement

Immediately after the April 19, 1984 interview, Judge Nixon telephoned Bud Holmes and told him that investigators had questioned him about his involvement in the Drew Fairchild case. Judge Nixon advised Mr. Holmes that he told the interviewers that "he had never talked to anyone at any time about the handling of the case, and he [Judge Nixon] repeated that two or three times."

(Holmes Senate Tr. 105). Mr. Holmes knew this was untrue, but adopted Judge Nixon's position so as not to cause the Judge embarrassment by admitting his involvement in a drug case (Holmes Senate Tr. 105, 146-147; Holmes Trial Tr. 757-758, 952; Holmes House Tr. 260-261).

Mr. Holmes later met with Judge Nixon in the Judge's chambers in Biloxi. Judge Nixon asked Holmes if he knew whether the telephone call from the farm with Wiley Fairchild had been taped. When Mr. Holmes responded that he did not know, Judge Nixon asked him to find out (Holmes Senate Tr. 106; Holmes Trial Tr. 758-759, 958; Holmes House Tr. 262). Mr. Holmes asked Carroll Ingram, who said that Wiley Fairchild did not usually tape calls, and Holmes reported this back to Judge Nixon (Holmes Senate Tr. 106; Holmes Trial Tr. 760-761, 954; Ingram Trial Tr. 1075, 1190, 1193; Holmes House Tr. 262-263; Ingram House Tr. 378-379).

On July 19, 1984, the day following his grand jury testimony, Judge Nixon issued a press statement that included the following remarks:

> I have read in the newspapers of a reported investigation of the handling of state drug cases against Mr. Drew Fairchild and others. The history of these cases can be provided by state authorities. I do not know Mr. Drew Fairchild; I have in no way participated in federal proceedings against other alleged participants with Mr. Drew Fairchild; I have never discussed the Drew Fairchild matter with Wiley Fairchild or any persons associated with the Fairchild companies; I never attempted to influence the handling of any aspect of the case; I have had absolutely nothing to do with any phase of the Drew Fairchild affair.
>
> (Subcomm. Ex. 24)

Judge Nixon's public statement led his friend Holmes to lie to the grand jury, to avoid "making Judge Nixon out not to be telling the truth" (Holmes House Tr. 263; Holmes Senate Tr. 106, 147).

In reviewing the trial record concerning Judge Nixon's contacts with Holmes after the April 19, 1984 interview, the Fifth Circuit Court of Appeals found that "[a] reasonable jury could conclude from these conversations that appellant [Nixon] was planning to hide the true facts from the grand jury and was soliciting Holmes' support." United States v. Nixon, 816 F.2d 1022, 1029 (1987) (House Ex. 32).

On September 6, 1984, the Hattiesburg grand jury indicted Wiley Fairchild on charges of perjury and paying an illegal gratuity to Judge Nixon. The perjury count alleged that Mr. Fairchild had instructed his employees to cover up his mineral transactions with Judge Nixon, and had failed to testify truthfully about this matter before the grand jury. The gratuity count was based upon the royalty payments to Judge Nixon (House Ex. 11).[12]

Like Judge Nixon, Wiley Fairchild had also covered up the fact that the Judge was involved in the Drew Fairchild drug case (Nixon Ex. 27, p. 1, paragraph 3). But following his indictment, in a meeting with his attorneys Mr. Fairchild "dropped his head", admitted he hadn't been "leveling" even with his own lawyers, and revealed for the first time his telephone conversation with Judge Nixon (Nixon Ex. 47, grand jury testimony of Karl Kepper, p. 10). Mr. Fairchild then gave a proffer to the government in which he described Judge Nixon's involvement in the Drew Fairchild drug case (W. Fairchild Trial Tr. 527-528, 692; W. Fairchild House Tr. 183, 186-187; Nixon Ex. 35).

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[12] United States v. Wiley Fairchild, Crim. No. H84-00009 (S.D. Miss., Hattiesburg Div). Count I of the indictment charged Mr. Fairchild with a violation of 18 U.S.C. Section 201(f), since amended, which prohibits the giving of a thing of value, such as royalty interests or a favorable loan, to a public official for and because of official acts to be performed by the public official. Mr. Fairchild pled guilty to this count of his indictment.

On November 26, 1984 Wiley Fairchild pled guilty to the illegal gratuity charge (House Ex. 12). The perjury count was dismissed as part of the plea bargain, and in September 1985 Mr. Fairchild was sentenced to two months of incarceration, served at a halfway house in Jackson, Mississippi (House Ex. 13).

Federal prosecutors learned more about Judge Nixon's involvement in the drug case through an interview of Carroll Ingram in January 1985 (Ingram Senate Tr. 168, 175-176). After Mr. Ingram told Mr. Holmes that the government knew about the phone call and Judge Nixon's involvement, Mr. Holmes met with Judge Nixon in the Judge's car after dark in the courthouse parking lot in Hattiesburg (Holmes Senate Tr. 106-107; Holmes Trial Tr. 762, 965; Holmes House Tr. 265-266; Ingram House Tr. 380-381). Holmes told Judge Nixon about Carroll Ingram's disclosure to the government and advised that they should not conceal the phone call any longer. Judge Nixon responded that he did not know what Holmes was talking about and that he knew nothing about any phone call. Judge Nixon the chastised Holmes for talking with Ingram about the call (Holmes Trial Tr. 762-765; Holmes House Tr. 266-267).

A few days after his meeting in the parking lot with Judge Nixon, Bud Holmes appeared before the grand jury. In this grand jury appearance Holmes admitted there had been a phone call, but tried to "soft peddle" and cover it up in a way that would protect both himself and Judge Nixon (Holmes Senate Tr. 107; Holmes Trial Tr. 970-971, 974, 985, 997; Holmes House Tr. 268-269).

In March 1985 Bud Holmes was indicted by the Hattiesburg grand jury on charges of perjury and obstruction of justice that in part dealt with concealing the phone call to Wiley Fairchild from Holmes' farm (House Ex. 23). Mr. Holmes' criminal trial began on June 17, 1985. After jury selection Holmes agreed to plead guilty to a criminal information charging him with contempt, with part of his contemptuous behavior being that he "...refused to disclose the substance of the aforementioned telephone call . . . ." (House Ex. 24).

As part of his plea, Mr. Holmes agreed to cooperate with the government and provide truthful testimony (Holmes Trial Tr. 768; House Ex. 24). Mr. Holmes appeared again before the grand jury following his plea, apologized for covering up his knowledge of the telephone call and told the grand jury of Judge Nixon's involvement (Holmes Senate Tr. 108; Holmes Grand Jury testimony of 6/28/85; Defense Motion For New Trial Ex. 5). Mr. Holmes was fined

$10,000 and sentenced to one year in prison following his guilty plea (House Ex. 25).[13]

The special federal grand jury investigation also brought to a close the criminal prosecution of Drew Fairchild for his role in the drug smuggling conspiracy. After the passing of the case to the file in December 1982 and the restoration of the case to the active docket in January 1983, Drew's case had been continued because of delays in the Watkins prosecution until March of 1985 (D. Fairchild Trial Tr. 122; House Ex. 18). At that point and as a consequence of the special federal grand jury investigation into the handling of his case, Drew Fairchild was indicted on federal drug conspiracy charges, pled guilty at arraignment and received a 3-year sentence with all but six months of the sentence suspended (Subcomm. Ex. 34).[14] Drew Fairchild was also sentenced to 3 years on his state charges, to be served concurrently with his federal sentence (D. Fairchild Trial Tr. 123-124). As a result of a letter agreement between Drew's counsel and current Forrest County District Attorney Glen White, Drew served no time in state prison above and beyond his federal time (Subcomm. Ex. 35).

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[13] After paying his fine Mr. Holmes challenged the one-year prison term. On appeal, the Fifth Circuit Court of Appeals held that under the criminal contempt statute Mr. Holmes could be sentenced to a fine or imprisonment, but not both. Accordingly, Bud Holmes served no time in prison for his crime despite the objection of the government, which urged his incarceration. (Weingarten House Tr. 31, 85-86; Holmes House Tr. 277).

[14] United States v. Redditt Andrew Fairchild, Crim. No. H85-00005 (S.D. Miss., Hattiesburg Div.).

Finally, the Department of Justice also prosecuted Robert Royals, Drew's co-manager at the airport who had never been prosecuted by Mississippi authorities. Mr. Royals was indicted by the special federal grand jury, convicted and sentenced to three years imprisonment for his role in the conspiracy.[15] Robert Watkins, the pilot of the drug-smuggling plane, remains a fugitive.

7. The Consequences of Judge Nixon's Misconduct -- His Perjury Convictions, Prison Sentence and Suspension From the Practice of Law

On August 29, 1985, Judge Nixon was indicted by a federal grand jury sitting in Hattiesburg, Mississippi on one count of accepting an illegal gratuity in violation of 18 U.S.C. Section 201(g), and three counts of perjury (false declaration before a grand jury) in violation of 18 U.S.C. Section 1623 (House Ex. 28).

On February 9, 1986, following a two-week trial and eighteen hours of deliberation, the jury unanimously convicted Judge Nixon of two counts of perjury, while acquitting him of the illegal gratuity count and one perjury count (House Ex. 29). On March 31, 1986, Judge James H. Meredith of the Eastern District of Missouri, specially assigned to preside over the case, denied Judge Nixon's post-trial motions for acquittal and a new trial, and imposed a sentence of five years on each of the perjury counts, to run concurrently (House Exs. 30 and 31). Judge Nixon was released on his own recognizance pending appeal of his convictions.

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[15] United States v. Royals, 777 F.2d 1089 (1985).

On September 24, 1986, while his appeal was pending, the Supreme Court of Mississippi suspended Judge Nixon's license to practice law in that state, finding his perjury to be a felony involving "dishonesty, misrepresentation and deceit" such as to warrant suspension of his professional license (House Ex. 35). The State of Louisiana has also suspended Judge Nixon's license to practice law.

On April 30, 1987, the Fifth Circuit Court of Appeals affirmed the criminal convictions, and thereafter denied Judge Nixon's petition for rehearing en banc (House Exs. 32 and 33). On January 19, 1988, the United States Supreme Court denied Judge Nixon's petition for writ of certiorari (House Ex. 34).

On February 11, 1988, following exhaustion of Judge Nixon' appellate rights, the Judicial Council of the Fifth Circuit certified to the Judicial Conference of the United States, as provided by 28 U.S.C. Section 372(c)(7)(B), that Judge Nixon had engaged in conduct that might constitute grounds for impeachment under Article I of the United States Constitution (House Ex. 36). On March 15, 1988, based on the criminal convictions, the Judicial Conference certified and transmitted to the Speaker of the House of Representatives a determination that Judge Nixon's impeachment may be warranted (Id.).

On March 23, 1988, Judge Nixon reported to Eglin Air Force Base Camp in Florida to begin serving his sentence. Judge Nixon relinquished all judicial responsibilities following his indictment in August, 1985, and has not performed the duties of his position since that date. However, he will continue to draw his judicial salary for life, currently $89,500 per year, until he is removed from the bench by the Senate.

While the House was conducting its independent impeachment investigation, Judge Nixon sought to vacate his criminal conviction and sentence through a post-conviction petition, filed pursuant to 28 U.S.C. Section 2255, that alleged a variety of prosecutorial misconduct. The matter was assigned to Chief Judge John F. Nangle of the Eastern District of Missouri, and an evidentiary hearing on the petition was held in Jackson, Mississippi on August 29 and 30, 1988. After considering the evidence and argument by the parties, on December 19, 1988 Judge Nangle rejected the claims of prosecutorial misconduct and denied the motion to vacate the convictions (House Ex. 37). On appeal, in an opinion dated August 17, 1989, the Fifth Circuit also rejected Judge Nixon's post-conviction claims and ruled that he received a fair trial (House Ex. 39).

Only the second judge in the history of our nation to be convicted of a crime while serving on the bench, Judge Nixon admits that he has caused "pain" to the federal judiciary (Subcomm. Ex. 47 at 569). Judge Nixon's failure to tell the truth is admittedly a violation of his oath of office (Senate Tr. 215). Judge Nixon's lies to federal investigators and the grand jury, and the predictable consequences of that misconduct -- his indictment, conviction, incarceration and disbarment -- have tainted the integrity of the federal judiciary.

ARGUMENT

I. THE ARTICLES OF IMPEACHMENT ALLEGE GRAVE MISCONDUCT WARRANTING JUDGE NIXON'S REMOVAL FROM OFFICE

A. The Articles State Impeachable Offenses

The three Articles of Impeachment charge Judge Nixon with knowingly giving false or misleading testimony under oath during his July 1984 grand jury appearance. Article III also charges Judge Nixon with concealing information from federal investigators through false or misleading statements during his April 1984 interview.

These charges, if proven, clearly warrant Judge Nixon's removal from office.[16] Giving false testimony under oath to a grand jury is a crime, in violation of 18 U.S.C. Section 1623. Because truth is such an indispensable element of our judicial system, with federal judges entrusted with the important task of assessing credibility and finding the truth in cases that come before them, the notion of permitting a proven liar to sit on the bench strikes at the heart of the integrity of the judicial process.

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[16] Judge Nixon concedes that Articles I and II state impeachable offenses (Memorandum in Support of Motion to Dismiss Impeachment Article III, p. 7 at fn. 3). With regard to Article III, Judge Nixon has criticized the first two paragraphs of that Article, but he repeatedly conceded that it would be an impeachable offense to commit such a "grave crime" as lying to a grand jury or lying to federal investigators during an interview (Id. at p. 7, fn. 3; p.3, fn.2; pp.4 and 11).

It is difficult to imagine an act more subversive to the legal process then lying from the witness stand. A judge who violates his testimonial oath and misleads a grand jury is clearly unfit to remain on the bench. If a judge's truthfulness cannot be guaranteed, if he sets less than the highest standard for candor, how can ordinary citizens who appear in court be expected to abide by their testimonial oath?

Equally serious is the charge, set forth in the first part of Article III, that Judge Nixon gave false statements to federal authorities during an investigative interview. Such conduct is also a crime.[17] Effective law enforcement is predicated upon the notion that all citizens who agree to speak with federal authorities will provide truthful and complete information. Judge Nixon concedes that he was required to tell the truth during his interview (Nixon Senate Tr. 263). Our federal judges, an important part of the federal law enforcement system, must bear the same obligation as ordinary citizens and provide the truth if they consent to an investigative interview. Lying to law enforcement officials, like lying to a grand jury in sworn testimony, is incompatible with the conduct expected of federal judges. To permit a federal judge to remain on the bench after such behavior would undermine public respect for the law.

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[17] 18 U.S.C. Section 1001 provides as follows:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Judge Nixon was never charged with this crime, although the facts amply justify prosecution for this offense.

B. Any Motion To Dismiss Article III Should Be Denied

As of the date of this brief, Judge Nixon has not renewed his pre-trial motion to dismiss impeachment Article III. Should he attempt to do sc in proceedings before the full Senate, that motion should be denied.

Article III is patterned upon "omnibus" articles traditionally used in judicial impeachments, including the 1936 impeachment of Judge Ritter and the recent impeachments of Judges Claiborne and Hastings. Indeed, the very same arguments raised by Judge Nixon in his pre-trial motion were unanimously rejected by the Senate by vote of 93 to 0 on a similar motion to dismiss filed by Judge Hastings.

As recognized by the Senate Impeachment Trial Committee,

> "Article III states an intelligible and adequately discrete charge of an impeachable offense by alleging that Judge Nixon concealed information concerning several conversations in which he had engaged by making "one or more" false statements to investigating officials and "one or more" false statements to a grand jury.
>
> The House has substantial discretion in determining how to aggregate related alleged acts of misconduct in framing Articles of Impeachment and has historically frequently chosen to aggregate multiple factual allegations in a single impeachment article.

> **The House's itemization of the fourteen particular statements whose knowing falsity it is alleging serves to give Judge Nixon fair notice of the contours of the charge against him without reducing the intelligibility of the article's essential accusation that Judge Nixon knowingly concealed material information from the government's law enforcement agents.**
>
> (July 25, 1989 pre-trial Order of the Impeachment Trial Committee at p. 4, recited at pp. 10-11 of the Committee's Report)

In the event that Judge Nixon may renew his motion to dismiss Article III, the House has attached its response to that motion, filed on July 7, 1989, as an appendix to this brief. As set forth more fully in that response, any such motion should be denied.

C. The Applicable Burden of Proof

Impeachment is not a criminal proceeding, nor is it designed to punish further a judge who, as in this case, has been convicted of a crime and is serving a prison sentence. Rather, impeachment is a remedial measure, entrusted to the Congress under our Constitution, that protects the public by removing from office persons who are unfit to hold high positions of public trust.

Criminal conduct is not a prerequisite for impeachment. Historically, officials have been impeached and removed from office for misconduct that would not be a violation of the criminal law. But in this rare case, like the 1986 impeachment of Judge Harry

Claiborne of Nevada, the conduct at issue warrants both punishment under the criminal law and impeachment.

Because impeachment is not a criminal proceeding, the strict standard of proof "beyond a reasonable doubt," applicable in criminal proceedings, should not apply. During the Claiborne impeachment, by vote of 75 to 18, the Senate rejected Judge Claiborne's motion to designate "beyond a reasonable doubt" as the standard of proof in impeachments.[18] Of course, with regard to the statements of Judge Nixon at issue in Articles I and II, the jury in the criminal trial determined that these statements were false "beyond a reasonable doubt" in finding Judge Nixon guilty of perjury.

In pre-trial pleadings, Judge Nixon has argued that "beyond a reasonable doubt" should be the standard of proof in this proceeding. This standard was specifically rejected by the Senate during the Claiborne impeachment proceedings. Alternatively, Judge Nixon has argued that a "preponderance of the evidence" in support of the Articles of Impeachment would be insufficient to remove him from the bench. The House disagrees.

Each Senator will decide what degree of proof should fairly apply, consistent with the standard of conduct expected of federal judges and the need for public confidence in the integrity of the judiciary. But logic dictates that a lesser standard of proof should govern, for two reasons. First, although impeachment is a grave matter, it is not so serious as a criminal trial, in which a defendant faces incarceration and the ignominy of being branded a felon. Judge Nixon's personal interest in retaining the high privilege of serving as a federal judge is less important than private rights of liberty and property at stake in criminal and even some civil cases. Second, a lesser standard of proof helps to ensure that public confidence in the integrity of the judiciary will not be compromised. This is not simply an employment dispute between Congress and Judge Walter Nixon. The preeminent public interest in an untainted judiciary must be recognized in an impeachment proceeding.

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[18] Proceedings of the United States Senate in the Impeachment Trial of Harry E. Claiborne, 99th Cong., 2d Sess., S. Doc. 99-48 at 148-150. Even under the criminal standard of proof rejected by the Senate in the Claiborne impeachment proceedings, "it is not necessary that the defendant's guilt be proved beyond all possible doubt . . . A reasonable doubt is a real doubt, based upon reason and common sense after careful and impartial consideration of all the evidence in the case" (Jury Instructions, Trial Tr. 2075).

Whatever standard of proof may be applied, the evidence overwhelmingly establishes that Judge Nixon must be removed from office.

II. THE FOURTEEN STATEMENTS CHARGED IN THE ARTICLES OF IMPEACHMENT ARE FALSE OR MISLEADING

Judge Nixon's first line of defense, newly minted for the Senate trial and a complete reversal of his prior position, is that he simply "forgot" about his conversations with Wiley Fairchild and Bud Holmes at the time of his interview and grand jury appearance. He also attempts to argue, however, that the fourteen statements charged in the Articles of Impeachment are

literally true. Yet the false or misleading nature of these statements is established not only by the collective testimony of Wiley Fairchild, Bud Holmes and Carroll Ingram, but also by the testimony of Judge Nixon himself.

A. Article I

Article I deals with Judge Nixon's statement to the grand jury that Bud Holmes did not "discuss the Drew Fairchild case" with him (House Ex. 1 at p. 47-48). This statement led to Judge Nixon's first perjury conviction.

Throughout the criminal trial and on appeal, Judge Nixon unsuccessfully claimed that his conversation with Bud Holmes was not technically a "discussion," and that his dialogue with Holmes concerned blackmail in connection with the Drew Fairchild case, not the "case" itself. Judge Nixon continues to make these arguments half-heartedly to the Senate. But his narrow, semantic distinctions make no sense and are totally transparent.

The evidence shows that Judge Nixon himself uses the words "conversation" and "discussion" interchangeably. For example, Judge Nixon told the Senate that when he read about the Drew Fairchild case in the paper in early 1983, he "probably had the conversation with some other people concerning the matter when it did come out in the paper" (Nixon Senate Tr. 232). Yet in his testimony before the House, Judge Nixon described the very same event as follows: "So someone may have just told me when that [newspaper] article came out, and I saw it, and may have discussed it." (Nixon House Tr. 500)

Moreover, the word "discuss" cannot be the linchpin of Judge Nixon's defense, for Judge Nixon repeatedly told the interviewers and the grand jury that he did not "talk" to Bud Holmes about the case (House Ex. 1, p. 48, at issue in Article III (1)(G); House Ex. 2, p. 76 at lines 24-25, at issue in Article II and Article III (2)(G); and p. 76 at lines 16-18, at issue in Article III (2)(E)).

Thus, for all of the statements charged in the Articles of Impeachment to be true, the focus of Judge Nixon's defense must be on the word "case." Yet it is undisputed that Judge Nixon's contacts with Wiley Fairchild and Bud Holmes were about the Drew Fairchild case (Stewart Opening Statement, Senate Tr. 10-11; Fairchild Senate Tr. 55-56, 79, 83-84; Holmes Senate Tr. 97, 108, 145; Ingram Senate Tr. 165-166).

Even Judge Nixon admits that Wiley Fairchild's blackmail allegation concerned the Drew Fairchild case, and that the case was mentioned in the Judge's conversation with Holmes (E.g., Nixon House Tr. 464; Nixon Senate Tr. 249-250, 251, 252). Judge Nixon has stipulated that Wiley Fairchild thanked him for speaking with Holmes about the handling of Drew Fairchild's case and told him, "I'm satisfied." (House Ex. 41, Stipulation No. 71; Nixon Senate Tr. 253-254). By his own testimony and by stipulation, Judge Nixon proves the falsity of the statement at issue in Article I.

B. Article II

Article II deals with those portions of Judge Nixon's closing statement to the grand jury that led to his second perjury conviction. Judge Nixon told the grand jury he had "nothing whatsoever officially or unofficially" to do with the Drew Fairchild case in Federal court or state court (House Ex. 2, p. 76 at lines 10-13); and "never handled any part of it, never had a thing to do with it at all, and never talked to anyone, state or federal, prosecutor or judge, that in any way influenced anybody with respect to this case" (House Ex. 2, p. 76, line 23 - p. 77, line 1).

As outlined above in connection with Article I, the falsity of these statements is demonstrated by the collective testimony of Fairchild, Holmes and Ingram, as well as by Judge Nixon's own version of the events. Clearly Judge Nixon did have "unofficial" involvement in the drug case, did have "a thing to do with it," did "talk" to Wiley Fairchild, Bud Holmes and Carroll Ingram about the case, and "influenced" both Holmes and Fairchild in connection with the case. As a result of Judge Nixon's involvement, Wiley Fairchild's complaints were "satisfied" and the Drew Fairchild case was passed to the file.

Judge Nixon argues that he did not know he had influenced anyone in connection with the case. But this claim is utterly false. Bud Holmes told Nixon he would pass the case to the files (Holmes Senate Tr. 97, 99). Judge Nixon admitted influencing the case when he told Ingram that he had spoken with Holmes about the case with "positive" results (Ingram Senate Tr. 166). And by his stipulation that Wiley Fairchild thanked him for speaking with Holmes about the case and told the Judge, "I'm satisfied," Judge Nixon has conceded that Wiley Fairchild was influenced by the Judge's involvement (House Ex. 41, Stipulation No. 71; Nixon Senate Tr. 254).

3. Article III

Article III re-alleges the statements at issue in the first two Articles, as well as other false or misleading statements made by Judge Nixon in his April 1984 interview and in his grand jury testimony. A total of 14 statements are at issue in Article III.

a. The Interview Statements

In his April 1984 interview, Judge Nixon told the federal investigators that he "certainly never discussed anything about his [Wiley Fairchild's] son's case" (House Ex. 1, p. 25, at issue in Article III(1)(A)). Wiley Fairchild proved the falsity of this statement when he repeatedly told the Senate he had discussed the drug case in his meeting with Judge Nixon (Fairchild Senate Tr. 56, 79, 83). This interview statement was clearly false even under Judge Nixon's own current version of the events, for the Judge concedes, as he must, that Wiley Fairchild's blackmail complaint was about his son's case (Nixon House Tr. 464; Nixon Senate Tr. 249-252). In his Senate testimony, Judge Nixon sought to defend his interview answer by contending that the question dealt with "the time we were making the oil and gas deal" (Nixon Senate Tr. 264). Of course, such a qualification does not appear in the question or in Judge Nixon's answer. Moreover, Judge Nixon included the word "never" in his answer, undercutting his own argument.[19]

In his interview Judge Nixon stated the following:

Q: Do you recall any knowledge of the case, meaning the Fairchild case, while you were dealing with Wiley Fairchild?

N: No.

Q: And he certainly never brought it up?

N: Not to my recollection. I think I would recall that.

(House Ex. 1, p. 32, at issue in Article III(1)(B))

In his Committee testimony, Judge Nixon claimed this statement was accurate because he was not "dealing" with Wiley Fairchild at the time Fairchild brought up his son's case. But Judge Nixon's strained definition of "dealing" contradicts the fact that he was still receiving royalty payments, had spoken with Fairchild and Ingram about other possible investments, and was still indebted to Fairchild at the time Fairchild complained of blackmail. Furthermore, the word "never" in the question again makes Judge Nixon's answer completely false.

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[19] Judge Nixon's defense concerning his interview statement at issue in Article III (1)(A) shows how utterly inconsistent and contrived his position truly is. Judge Nixon told the jury at his criminal trial that he remembered his conversations with Fairchild at the time of his interview and grand jury testimony. He told the Senate he forgot about his conversations with Fairchild at the time of his interview and grand jury testimony. And his position here implies that during the interview he deliberately parcelled his knowledge, severing events when he was "dealing" with Fairchild from later events.

In his interview, Judge Nixon stated that he had "absolutely" no connection, no knowledge of, and no participation in the Drew Fairchild case from the time of the bust until the interview, "except something I read in the paper" (House Ex. 1, p. 31, at issue in Article III(1)(C)). When questioned about this passage before the Senate, Judge Nixon could not and did not contend this statement was true. Instead, he admitted the obvious falsity of this statement, stating that he "wished" he had remembered the events at issue and would have mentioned them if he had recalled them (Nixon Senate Tr. 265).

In the interview Judge Nixon told federal investigators that he "didn't even know he [Drew Fairchild] existed, except from what I read about that and what you just told me. Absolutely no" (House Ex. 1, p. 33, at issue in Article III(1)(C)). This statement was clearly false, as even Judge Nixon himself must concede. Judge Nixon admittedly knew of Drew's existence from his conversations with Wiley Fairchild and Bud Holmes (Nixon House Tr. 509).

In the interview Judge Nixon stated that "nothing was done or nothing was ever mentioned about Wiley Fairchild's son" (House Ex. 1, p. 37, at issue in Article III(1)(D)). Judge Nixon admitted this passage was false when he confirmed that Fairchild told him, "I have got a son named Drew," and that Wiley Fairchild "mentioned" his son when he complained to Judge Nixon about the handling of the drug case (Nixon House Tr. 432-433).

In the interview Judge Nixon told federal investigators that he "never heard about the case except what I told you" and "certainly had nothing to do with it" (House Ex. 1, p.43, at issue in Article III(1)(E)). Again, this statement was obviously false even under the Judge's own version of the events, for he heard about the drug case from Fairchild and Holmes and helped to satisfy Fairchild's complaint about the handling of the case.

In the interview Judge Nixon told federal investigators that he "certainly didn't do a thing in the world" to influence the Drew Fairchild case (House Ex. 1, p. 47, at issue in Article III(1)(F)). The testimony of Holmes, Ingram and Fairchild proves otherwise. Judge Nixon "put in a good word" for Drew Fairchild, influenced Holmes to drop the charges and pass the case to the file, and then took credit for the deed in his telephone conversation with Ingram.

Finally, during the interview Judge Nixon denied that Bud Holmes ever talked to him about the Drew Fairchild case (House Ex. 1, p. 48, at issue in Article III(1)(G)). For the reasons outlined above in connection with Article I, this statement was clearly false.

b. The Grand Jury Testimony

Article III alleges seven false or misleading statements by Judge Nixon during his grand jury testimony. Of the seven, four (subparts (A), (D), (F) and (G)) are previously alleged in Articles I and II.

In addition to those grand jury statements outlined above in connection with Articles I and II, Judge Nixon told the grand jury that he did not know "of any reason I would have met with him [Wiley Fairchild] after the transaction was finalized in the first part of 1981, but I can't say for sure. It's possible" (House Ex. 2, p. 56, at issue in Article III(2)(B)). Since during his testimony before the grand jury Judge Nixon did in fact recall the meeting when Fairchild complained of blackmail, as the Judge admitted during his criminal trial testimony, this statement was necessarily false (Nixon Trial Tr. 1585-1586, 1590-1591).

Judge Nixon also told the grand jury that he was "very happy to cooperate with this grand jury and give them all the information that I have and that I could" (House Ex. 2, p. 75, at issue in Article III(2)(C)). Yet Judge Nixon told the House that he consciously chose not to reveal his meetings with Fairchild and Holmes because he thought Wiley's complaints had been "resolved" and that it would have been "irresponsible" of him to "blab" about the matter to the grand jury (Nixon House Tr. 448, 517). Accordingly, crediting Judge Nixon's House testimony, he deliberately chose not to give the grand jury all the information he had, proving the falsity of this statement.

Finally, Judge Nixon told the grand jury he "never talked to anyone about the case, any federal judge or state judge, federal prosecutor or state prosecutor" (House Ex. 2, p. 76 at lines 16-18, at issue in Article III(2)(E)). Judge Nixon did not qualify this statement with the phrase, "that in any way influenced anybody," as he did at p. 76, line 25 through p. 77, line 1 of his grand jury testimony (at issue in Article II and Article III(2)(G)). The obvious falsity of this statement is outlined above in connection with Articles I and II. Judge Nixon talked with Holmes, Fairchild and Ingram about the drug case.

III. JUDGE NIXON WAS AWARE OF THE SCOPE OF THE FEDERAL INVESTIGATION, AND HIS STATEMENTS WERE MATERIAL TO THE INVESTIGATION

In argument to the Senate Impeachment Trial Committee, Judge Nixon suggested that his interview statements and grand jury testimony at issue in the Articles of Impeachment were not material to the grand jury's investigation. This argument is simply ludicrous, for the false or misleading statements at issue here were clearly material to the federal investigation. Equally nonsensical is Judge Nixon's lame protest that he "didn't understand" that the investigators wanted to know of any contacts the Judge may have had with Bud Holmes and Wiley Fairchild concerning the Drew Fairchild drug case.

A principal focus of the federal investigation was the strange handling of the Drew Fairchild drug smuggling case. Judge Nixon was told that investigators were looking at the case "from top to bottom, from the bust in August, 1980" until the day of the interview (House Ex. 1, p. 38). The interviewers told Judge Nixon that the case had been passed to the file, returned to the active docket, and more than 3 1/2 years had passed without Drew Fairchild ever being sentenced (House Ex. 1, p. 44). As the investigators told Judge Nixon:

> **Mr. Weingarten:** You don't have to be a genius or a particularly sophisticated FBI Agent to wanna know why a case from August, eighty, has never been resolved to this day ah when the evidence appears to be extremely strong. That's the focus of the allegation. In addition, we received information from the same source that ah - I don't want to use the word sweetheart, but the word imbalanced financial relationship developed between this Mr. Fairchild, Drew's father, and you, the chief judge of the district -
>
> **Judge Nixon:** Uh-huh --
>
> **Mr. Weingarten:** So here we are. Okay --
>
> (House Ex. 1, p. 45)

Federal investigators quite rightfully wanted to know whether Judge Nixon knew anything about the Drew Fairchild case. To that end, Judge Nixon was questioned at great length in his April 1984 interview about the Drew Fairchild case (House Ex. 2). Judge Nixon well knew that the investigation was focusing upon the Drew Fairchild criminal case, and so admitted that obvious fact repeatedly during his grand jury testimony and in his press release issued the day following his testimony (House Ex. 2, p. 76 at lines

6-10 and p. 77 at lines 6-11; Subcommittee Ex. 24). To suggest that Judge Nixon's categorical denials of any knowledge of or involvement in the case were not material, when in fact he did have significant behind-the-scenes involvement in the case, is simply absurd. Indeed, Judge Nixon in his Answer to the Amended Articles of Impeachment concedes that his conversation with Holmes was "relevant" to the grand jury investigation (Answer, pg. 1).

Materiality is an element of the crime of making a false declaration to the grand jury under 18 U.S.C. Section 1623. Had the grand jury felt that Judge Nixon's statements were not material, he would not have been indicted for these crimes. At Judge Nixon's criminal trial, the foreman of the grand jury confirmed that Judge Nixon's statements were in fact material to the grand jury investigation (Ward Trial Tr. 60-80).

The trial judge who presided over Judge Nixon's criminal trial specifically found that Judge Nixon's statements were material (Trial Tr. 80). And significantly, Judge Nixon did not appeal this finding, thus conceding the question of materiality. His strained effort to resurrect this long-resolved issue has no force whatsoever.

IV. THERE IS OVERWHELMING EVIDENCE THAT JUDGE NIXON INTENDED TO CONCEAL THE TRUTH FROM FEDERAL INVESTIGATORS AND THE GRAND JURY

Because Judge Nixon by his own testimony has grudgingly conceded that many of his statements at issue in the Articles of Impeachment are in fact false or misleading, the key question for the Senate is whether Judge Nixon deliberately made these repeated false statements, or whether his false statements were simply a series of honest blunders. The question boils down to one of intent, and there is overwhelming evidence that Judge Nixon knowingly intended to conceal information through the repeated false statements charged in the three Articles of Impeachment.

Obviously the Senate, sitting as a jury in this case, cannot peer into Judge Nixon's mind to determine what he was actually thinking at the time of his interview and grand jury testimony. Instead, as the trial judge instructed the jury at the criminal trial, one must look for objective evidence of Judge Nixon's probable intent:

> "Intent ordinarily may not be proved directly, because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer the defendant's intent from the surrounding circumstances. You may consider any statements made and done or omitted by the defendant, and all other facts and circumstances in evidence which indicate his state of mind.
> You may consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted.
> (Jury Instructions, Trial Tr. 2085)

Here the objective facts, coupled with Judge Nixon's own inconsistent testimony, conclusively establish his intent to conceal from federal investigators and the grand jury his contacts with Wiley Fairchild, Bud Holmes and Carroll Ingram concerning the Drew Fairchild drug smuggling case.

A. Judge Nixon's Intent to Deceive Is Confirmed By His False Testimony to The Senate That He "Did Not Recall" His Conversations With Holmes and Fairchild

The best evidence that Judge Nixon has no regard for the truth and was properly convicted of perjury is his own Senate testimony. For in his appearance before the Senate Impeachment Trial Committee, Judge Nixon lied about a simple but seminal point -- whether, at the time of his interview and grand jury appearance, he recalled his meeting with Fairchild, his visit to Holmes' farm and his telephone call to Fairchild. Judge Nixon's lie on this basic point completely undermines his credibility as a witness, and confirms his intent to deceive.

During his testimony before the Senate Impeachment Trial Committee, Judge Nixon repeatedly contended that at the time of his interview and his grand jury testimony, he "did not recall" his meeting with Wiley Fairchild, his visit to Holmes' farm and his subsequent telephone conversation with Fairchild. Judge Nixon tearfully told the Senate he had "forgotten" about these events and now "wished to God" he had remembered the facts at the time of his interview and grand jury appearance. In his Senate testimony, Judge Nixon claimed that he did not remember these events until February 1985, when a meeting with Bud Holmes "triggered" his recollection concerning these events. (Nixon Senate Tr. 265, 269-270, 272, 273-274, 276). Judge Nixon swore to the Senate that he had "absolutely" no recall of his contacts with Wiley Fairchild and Bud Holmes concerning the Drew Fairchild case during either the

April 1984 interview or his July 1984 grand jury appearance (Nixon Senate Tr. 274). This astounding testimony, which has now become Judge Nixon's principal defense, was a complete reversal of his previous position.

As the Impeachment Trial Committee correctly recognized in its Report at pp. 74-79, Judge Nixon's Senate testimony that he simply "did not recall" his blackmail meeting with Wiley Fairchild, his visit to Holmes' farm and his telephone call to Fairchild is directly contradicted by Judge Nixon's own prior sworn testimony during his criminal trial and the House impeachment proceedings. During his criminal trial, Judge Nixon repeatedly testified that he was in fact aware of his contacts with Fairchild and Holmes, both at the time of his interview and during his grand jury appearance:

> Q: (By Judge Nixon's counsel) While you were in there [testifying before the grand jury], did you in fact were you aware of the fact that there had been a discussion between you, excuse me, there was a meeting where you were over at Wiley's office and then you had been at Bud's farm that evening and the phone call. Were you aware of that when you were in the grand jury?
>
> A: (By Judge Nixon) Yes.
>
> (Nixon Trial Tr. 1585-1586)
>
> * * * *
>
> Q: (By Judge Nixon's counsel) I want to ask you another question. You told us that you went to that grand jury or when you were at the grand jury you were aware that you had seen Wiley on a night several years before or I should say an afternoon that you were at the farm and passed on the blackmail complaint of Wiley's to Bud Holmes, right?
>
> A: (By Judge Nixon) Right.

Q: And that Bud then made a phone call to Wiley which surprised you but it did occur, correct?

A: Yes.

Q: And you're in the grand jury. Were you aware at that time did you remember those events?

A: Yes.

(Nixon Trial Tr. 1590-1591)

* * * *

Q: (By Mr. Weingarten) Did we not discuss the Drew Fairchild case in great detail [during the April 1984 interview]?

A: (By Judge Nixon) You discussed all 3 matters.

Q: Including Drew's case?

A: Yes.

Q: In your mind at that moment did you recall the allegation by Wiley Fairchild?

A: What allegation?

Q: About Bud Holmes blackmail.

A: Complaint?

Q: Yes.

A: Yes.

(Nixon Trial Tr. 1709-1710)

* * * *

And during his criminal trial, Judge Nixon was asked whether he knew of his meeting when Fairchild complained of blackmail in connection with the drug case, when he told the grand jury he "didn't know of any reason" he would have met with

Fairchild after the investment was finalized in early 1980 -- the specific statement at issue in impeachment Article III (2)(B). Judge Nixon answered, "I knew that, yes" (Nixon Trial Tr. 1733).

Indeed, at Judge Nixon's request, at the close of the criminal trial the jury was given the following instruction by the Court to summarize Judge Nixon's defense:

> "With respect to the perjury charges contained in Counts Two, Three and Four, Judge Nixon contends that at the time he appeared before the grand jury and gave the answers which form the basis of the perjury charges that ...
>
> (2) He was aware that he had had a conversation with Wiley Fairchild in which Fairchild complained that he was being blackmailed by Bud Holmes, and possibly Carroll Ingram, due to the publicity coming out of his son's case; and
>
> (3) He remembered mentioning Fairchild's blackmail allegation to Bud Holmes, but they did not discuss the Drew Fairchild case.
>
> (Jury Instructions, Trial Tr. 2102)

During his sworn testimony before the House, Judge Nixon never once suggested he "forgot" about his contacts with Fairchild and Holmes at the time of his interview and grand jury appearance. Rather, Judge Nixon told the House that he deliberately did not volunteer this information, because he thought it would be "irresponsible" to convey Fairchild's blackmail complaint to the grand jury:

> Q: (By Mr. Stewart) Let me go back to that interview that you had in April of 1984, just for a second. Slide back a couple of hours. Now we have covered that you were not asked about those allegations of blackmail that Mr. Fairchild had made to you.
>
> I take it you did not volunteer to the investigators that you had heard those allegations from Mr. Fairchild?

A: (By Judge Nixon) No. I didn't.

Q: Why not?

A: Well, first of all, of course as you say, I was not asked about it. I thought it was a lot of nonsense to begin with. I thought it was a misunderstanding. That night, apparently, it turned out that it had been a misunderstanding, and as a result of Holmes' call to Fairchild, apparently the misunderstanding had been resolved because Mr. Fairchild said he was satisfied, and I heard nothing more about the matter after that, and I think it would have been irresponsible, to say the least, for me to go around blabbing about something that didn't amount to anything, especially something like a blackmail charge.

(Nixon House Tr. 448)

* * * *

Q: (By counsel for the House) Did you tell the grand jury about the phone call?

A: (By Judge Nixon) No. I wasn't asked about it, and I told you why I didn't volunteer it -- because I didn't think it amounted to anything, and I thought it was all resolved. I thought it was nonsense, and it would have been irresponsible, I think, for me to bring that back up.

(Nixon House Tr. 517)

Judge Nixon's Senate testimony that he simply "forgot" is completely at odds with his prior sworn testimony. _See_ Report of the Impeachment Trial Committee at pp. 74-79. Having previously testified that he _did_ remember the important events at the time of his interview and grand jury testimony, Judge Nixon chose to lie to the Senate in an effort to escape pointed questioning from the Senate about the 14 false statements charged in the Articles of Impeachment. There can be no clearer evidence of Judge Nixon's lack of fitness to serve on the bench than his remarkable change of position on the most important question concerning his state of mind -- whether he remembered the events at issue at the time of his interview and grand jury appearance.

Just as Judge Nixon hid from federal investigators and the grand jury the truth about his involvement in the drug smuggling case, so too does he now attempt to hide the truth from the Senate by claiming that he "forgot" about his involvement in the drug case at the time of his interview and grand jury appearance. Judge Nixon has saved his most egregious falsehood for the Senate.

The flimsiness of Judge Nixon's claim that he simply "forgot" about his contacts with Wiley Fairchild and Bud Holmes is further shown by the Judge's own testimony concerning his state of mind at the time of those conversations. Judge Nixon has testified that he was "shocked" and "taken aback" by Fairchild's complaints of blackmail (Nixon Senate Tr. 258-259); that he felt "caught in the middle" and wanted to get out "as fast as he could" (Nixon Senate Tr. 259; Nixon Trial Tr. 1688); that he was "embarrassed," "very uncomfortable" and wished he had not been in that situation (Nixon Senate Tr. 260; Nixon Trial Tr. 1679); and that he was "disgusted" by what had occurred at Bud Holmes' farm (Nixon Senate Tr. 260; Nixon Trial Tr. 1693). When questioned at great length about whether he had any contacts with Holmes and Fairchild about the drug case, would Judge Nixon "forget" unique events that generated such strong emotions? Certainly not.

Indeed, Judge Nixon now purports to recall in vivid detail the specific date, circumstances and very words of his meeting in which Wiley Fairchild complained of being blackmailed in connection with his son's case, his visit to Holmes' farm, and the telephone call to Wiley Fairchild. Does it make sense that Judge Nixon would "forget" these facts in 1984, when he is questioned over and over during the interview and before the grand jury again about any contacts with Fairchild or Holmes concerning the drug case, but then remember vivid details five years later in his testimony before the Senate.

In short, Judge Nixon's newly-concocted claim of amnesia is simply unworthy of belief. To credit Judge Nixon's defense of "no recollection," the Senate must (1) ignore the Judge's own trial testimony that he did in fact recall; (2) ignore the Judge's House testimony that he consciously chose not to reveal the events to the grand jury; (3) conclude that at no time during the interview, when he was repeatedly questioned about his contacts with Fairchild and Holmes, did Judge Nixon recall the key events; (4) conclude that Judge Nixon did not recall these "shocking," "embarrassing," and "disgusting" events during the three-month period following the interview, when Judge Nixon was the subject of media attention, searched his files, consulted with counsel, reviewed his interview transcript and prepared written remarks for the grand jury; (5) find that Judge Nixon responded to questioning during the grand jury, and delivered his prepared closing statement to the grand jury, without remembering the key events; (6) credit Judge Nixon's latest version that he did not recall the events until early 1985, when he was sitting in his car with Bud Holmes in the parking lot after dark; and (7) accept Judge Nixon's lame explanation as to why he did not step forward and tell the government about the facts, once Holmes "refreshed" his memory.

B. Judge Nixon's Statements to the Grand Jury Were Premeditated

In assessing Judge Nixon's intent, it is important for the Senate to note that Judge Nixon's statements to the grand jury at issue in the three Articles of Impeachment were not the spontaneous utterances of someone presented with a question for the first time. Rather, Judge Nixon's grand jury testimony was pre-meditated.

During the April 1984 interview, Judge Nixon was questioned for over an hour in great detail about his knowledge of the Drew Fairchild drug case. Judge Nixon was repeatedly asked whether he ever discussed the case with Bud Holmes or Wiley Fairchild. Judge Nixon repeatedly denied any contacts with Holmes or Fairchild about the case (House Ex. 1).

Nearly three months passed before Judge Nixon testified in the grand jury. During those three months, Judge Nixon was able to reflect on what he had told the investigators, and consider what in fact his involvement in the drug case had been. Judge Nixon spoke with Holmes and Ingram about the investigation. Judge Nixon retained counsel. He obtained a copy of the interview transcript.

and reviewed it (Nixon Senate Tr. 275-276). And in anticipation of being given an opportunity to appear before the grand jury, Judge Nixon prepared a written statement (Nixon House Tr. 517).

That written statement led to one of Judge Nixon's perjury convictions and is perhaps the most damning part of the Judge's grand jury testimony. In that prepared statement, Judge Nixon confirmed twice his recognition that the investigation was about the Drew Fairchild case. Testifying under oath from his prepared statement, Judge Nixon told the grand jury that he had "nothing whatsoever officially or unofficially" to do with the case. He told the grand jury, "I don't need to reconstruct anything" with reference to the Drew Fairchild case. And Judge Nixon then told the grand jury, not just once but twice, that he "never talked to anyone" about the case, including the state prosecutor (House Ex. 2, p. 75-77).

In answer to pointed questioning by Vice-Chairman Danforth, Judge Nixon's own character witnesses described the Judge as a precise man who chooses his words carefully, and who maintains a cool and even demeanor (Eppes Senate Tr. 207; Denton Senate Tr. 211). Judge Nixon's premeditated, prepared statement to the grand jury, given after he had ample opportunity to reflect upon the facts and his interview answers, confirms that he made no honest mistake but instead intended to conceal the truth from the grand jury.

C. Repeated False Or Misleading Statements Show Intent to Deceive, Not Honest Mistake

The fourteen statements of Judge Nixon at issue in the Articles of Impeachment are themselves strong evidence of his intent to conceal information. For Judge Nixon vehemently and categorically denied involvement in and knowledge of the drug case, over and over again, in many different ways, often volunteering strong denials in response to questions that did not necessarily call for a denial. These repeated false statements, taken together, conclusively establish that Judge Nixon fully intended to conceal information during his interview and grand jury testimony.

Judge Nixon's suggestion that his statements were the result of "honest mistake," rather than deliberate deceit, might be tenable if he had denied involvement in the drug case only once, in passing. But a series of fourteen false statements are at issue here, delivered in two different settings (the interview and the grand jury) over a period of three months. The sheer number of Judge Nixon's categorical and volunteered denials show intent to deceive, rather than honest mistake.

D. Judge Nixon's Claim That "Nothing Happened" Is False, And Shows His Continuing Intent To Deceive

In his testimony before the Senate, Judge Nixon claimed that his contacts with Fairchild and Holmes were "a nothing" (Nixon Senate Tr. 241). But Judge Nixon's description and characterization of the events contrasts sharply with the testimony of the other witnesses. The testimony of Wiley Fairchild, Bud Holmes and Carroll Ingram establishes that Judge Nixon "put in a good word" for Drew Fairchild, resulting in the case being passed to the file even though Drew had pled guilty to drug smuggling.

Wiley Fairchild testified that because of Judge Nixon's involvement, the Drew Fairchild case was passed to the file (Fairchild Senate Tr. 54, 80, 88). Bud Holmes testified that but for Judge Nixon's intervention, the case would not have been passed to the file (Holmes Senate Tr. 102, 146; Holmes House Tr. 253, 275, 311). Bud Holmes and Carroll Ingram both testified that Judge Nixon "put in a good word" for Drew (Holmes Senate Tr. 97, 98-100; Holmes Trial Tr. 736-738; Holmes House Tr. 246-247; Ingram Senate Tr. 166; Ingram House Tr. 388, 412). Carroll Ingram also associates the passing of the case to the file with Judge Nixon's involvement (Ingram Senate Tr. 164-165, 167).

The testimony of Fairchild, Holmes and Ingram not only proves the falsity of Judge Nixon's interview statements and grand jury testimony. As important, these witnesses show Judge Nixon's contrived version of the events to be simply another in a long series of lies to avoid responsibility for involvement in the Drew Fairchild drug smuggling case.

Bud Holmes and Wiley Fairchild are friends of Judge Nixon, with reason to help him in these proceedings if they can. Nevertheless, Judge Nixon challenges the credibility of these men. But on the key points Fairchild and Holmes corroborate each other, and are further corroborated by Carroll Ingram, whose credibility has never been challenged. The mutually corroborated testimony of these three witnesses forms an iron cage from which the Judge cannot escape.

For example, Judge Nixon accuses Wiley Fairchild, his friend and business partner, of lying about the date of the key events and who placed the call from Holmes' farm. Yet Fairchild's testimony about the date - before the Drew Fairchild drug case was passed to the file - is corroborated by both Holmes and Ingram, and Holmes confirms that Judge Nixon placed the call. And on all other important details, Judge Nixon's version of his meeting and telephone conversation with Fairchild is "substantially similar" to Fairchild's version (Committee Report at p. 38).

So Judge Nixon then turns his attack on his old and close friend, Bud Holmes, claiming that Holmes for some strange reason has lied about his dialogue with the Judge concerning the drug case. Yet Carroll Ingram confirms that the Judge "put in a good word" for Drew Fairchild, just as Holmes testified (Ingram House Tr. 388, 412). Fairchild corroborates Holmes that the drug case was passed to the file because of Judge Nixon's involvement, and Ingram too associates the passing of the case to the file with Judge Nixon's involvement, based upon his telephone conversation when Judge Nixon took credit for helping Drew.

Indeed, it is Judge Nixon's friend Carroll Ingram who erases any doubt about who is lying in this case. Judge Nixon has never attacked Ingram's credibility, instead describing him as an honest, honorable and truthful man (Nixon House Tr. 474-475).

Judge Nixon denies mentioning the Drew Fairchild case to Ingram. But Ingram has consistently testified that the Judge told him that he had spoken with Holmes about the drug case at Fairchild's request, with "positive" results. As the prosecution pointed out during the criminal trial, Carroll Ingram "kills" Judge Nixon on the perjury charges (Trial Tr. 1980). Ingram's testimony leaves no doubt that it is Judge Nixon, not Fairchild and Holmes, who is lying about the events in question.

E. Judge Nixon's Intent To Conceal The Truth Is Shown By His Admitted State Of Mind At The Time He Met With Holmes and Fairchild

Judge Nixon claims that he was "shocked" and "taken aback" by Fairchild's complaints of blackmail (Nixon Senate Tr. 258-259); felt "caught in the middle" and wanted to get out "as fast as he could" (Nixon Senate Tr. 259; Nixon Trial Tr. 1688); felt "embarrassed," "very uncomfortable" and wished he had not been in that situation (Nixon Senate Tr. 260; Nixon Trial Tr. 1679); and felt "disgusted" by what occurred at Holmes' farm (Nixon Senate Tr. 260; Nixon Trial Tr. 1693).

These emotions reveal the obvious -- that Judge Nixon realized it was inappropriate for a federal judge, having obtained a lucrative investment from a businessman, to become involved as a middleman in a state drug prosecution of the businessman's son. Even if the Senate credits Judge Nixon's benign version of the events, there was ample motive for Judge Nixon not to be candid in his interview and before the grand jury. By concealing the truth from federal investigators, Judge Nixon could hope that his involvement in a "shocking," embarrassing," "uncomfortable" and "disgusting" situation would never be made public.

Judge Nixon's motive to lie becomes even clearer through the testimony of Fairchild, Holmes and Ingram. For although these witnesses are all friends of Judge Nixon and try to help him in these proceedings, they paint the picture of a federal judge seeking to ingratiate himself with a businessman by "putting in a good word" for the businessman's son in a drug case. Fairchild and Holmes have testified that because of Judge Nixon's involvement, the Drew Fairchild drug smuggling case was passed to the file with no punitive consequences even though Drew had pled guilty. And according to Carroll Ingram, a witness whose credibility has never been challenged, Judge Nixon took credit for helping Drew in the same breath as discussing the possibility of further investments with Wiley Fairchild. Although there is never a good reason to lie, it is not surprising that Judge Nixon decided not to reveal his misconduct to federal investigators and the grand jury.

F. Judge Nixon's Intent To Deceive Is Shown By His False Testimony Concerning His Whereabouts On May 14, 1982

At Judge Nixon's criminal trial, a major thrust of his defense was that he was not in Hattiesburg on May 14, 1982, the date Bud Holmes believes the visit to the farm took place. Judge Nixon told the jury that he was not in Hattiesburg "for one minute" on that day, that he was "positive" he spent the entire day in his chambers in Biloxi (Nixon Trial Tr. 1547-1548, 1556). Judge Nixon told the jury that on the afternoon of May 14, he "prepared for the trial of that asbestos case that was beginning Monday. Read the pre-trial order again, went over proposed jury instructions, read some of the depositions with respect to the motions that I had to decide, the admissibility of certain evidence and what have you" (Nixon Trial Tr. 1554).

This testimony was undeniably false. Documentary evidence proves that Judge Nixon received dental treatment in Hattiesburg on May 14, visited the office of Carroll Ingram and then went to Bud Holmes' office in the late afternoon of May 14, exactly as Holmes testified (House Exs. 27 and 42).

Judge Nixon weakly explains his trial testimony as yet another honest "blunder" (D. Stewart House Tr. 125). He claims to have contacted a number of people during his criminal trial in an effort to ascertain his whereabouts that afternoon (B. Nixon House Tr. 102-108). Yet did Judge Nixon explain to the jury his uncertainty about where he was that afternoon, or outline his efforts to investigate the question? No. Instead, he told the jury he was "positive" he was not in Hattiesburg, and vividly painted a false picture of what he supposedly did that afternoon. Judge Nixon's false testimony on this point is yet another example of his willingness to ignore the truth to suit his own purposes.

G. Judge Nixon's Corrupt Intent Is Shown By His Efforts To Cover Up His Involvement In The Drug Case

As recognized by the Fifth Circuit Court of Appeals in its opinion affirming Judge Nixon's perjury convictions, Judge Nixon's conduct after the investigation began is strong evidence of his intent to conceal the truth from the grand jury (United States v. Nixon, 816 F.2d 1022 (5th Cir. 1987), House Ex. 32).

Immediately after the April 19, 1984 interview, Judge Nixon called Bud Holmes and repeatedly told Holmes that he [Nixon] had told the investigators that "he had never talked to anyone at any time about the handling of the case" (Holmes Senate Tr. 105, 146-147; Holmes Trial Tr. 757-758, 952; Holmes House Tr. 260-261). This statement was obviously false. But Judge Nixon's old friend Holmes got the message and adopted the same position to save the Judge from embarrassment.

Thereafter, Judge Nixon met with Holmes in the Judge's chambers in Biloxi, and asked Holmes to find out whether the phone call from the farm had been taped (Holmes Senate Tr. 106; Holmes Trial Tr. 758-759, 958; Holmes House Tr. 262). Judge Nixon issued a press statement again categorically denying any involvement in the drug case (Subcomm. Ex. 24). Later, Judge Nixon and Holmes discussed the investigation after dark in the Judge's car in a parking lot (Holmes Senate Tr. 107; Holmes Trial Tr. 762, 965; Holmes House Tr. 265-266).

As found by the Fifth Circuit Court of Appeals, "[a] reasonable jury could conclude from these conversations that appellant [Judge Nixon] was planning to hide the true facts from the grand jury and was soliciting Holmes' support" (U.S. v. Nixon, House Ex. 32 at 3847).

Even after he was well aware that the government was interested in the telephone call to Fairchild from Holmes' farm, Judge Nixon did not come forward in good faith to present his knowledge of the event. Instead, he continued to cover up the truth. Judge Nixon told the Senate he did not come forward because the courthouse was "like Gestapo headquarters or KGB headquarters" during the grand jury investigation (Nixon Senate Tr. 289, 304). But Judge Nixon's picture of persecution is simply untrue. In fact, the grand jury was ready and willing to hear any information Judge Nixon wished to convey (Ward Trial Tr. 105-106) If Judge Nixon were truly interested in disclosing the truth, he would have stepped forward to clear up his interview and grand jury remarks. Judge Nixon's failure to come forward with the truth further highlights his intent to conceal information from the grand jury.

H. Judge Nixon's Handling of Federal Litigation Involving Fairchild Is Yet Additional Evidence Of Intent To Conceal

Judge Nixon presided over two civil cases in which W. R. Fairchild Construction Company, of which Wiley Fairchild was managing partner and chief operating officer, was a party. In both cases Judge Nixon rendered rulings affecting Fairchild Construction Company, even as he was consummating and benefitting from his oil investment with Fairchild Construction Company. At no time did Judge Nixon recuse himself or disclose his relationship with Fairchild Construction Company to the other parties in the cases. This is yet additional evidence of Judge Nixon's pattern of concealing the truth concerning his relationship with Wiley Fairchild, and his complete lack of credibility as a witness.

The first civil case, The Boam Co., et al. v. Dependable Insurance Co., et al., filed in October 1977, involved construction claims arising out of the erection of pump stations for a sewage system in Gulfport, Mississippi (House Tr. 3/2/89, 73). On August 24, 1978 Fairchild Construction Company, a subcontractor on the Gulfport sewer project, moved to intervene as a party in the case and claimed $18,600 in damages (House Tr. 3/2/89, 95). Judge Nixon rendered judgments in the case filed by and against parties other than Fairchild Construction in February of 1979 (House Tr. 3/2/89, 131, 132). These judgments were contemporaneous with the Judge's first meeting with Carroll Ingram to discuss the possibility of investing with Wiley Fairchild (Nixon House Tr. 420). Judge Nixon first mentioned the name Fairchild (Ingram Senate Tr. 161), thus raising the specter of a federal judge knowingly soliciting a financial transaction from a party in a case pending before him.

During the spring and summer of 1979, Judge Nixon checked on Wiley Fairchild's reputation with, among others, Bud Holmes; reconfirmed with Carroll Ingram his interest in investing with Wiley and told Mr. Ingram that he could invest about $10,000;

repeatedly contacted Mr. Ingram to determine Wiley's response; and ultimately learned from Mr. Ingram that Wiley Fairchild would be "delighted" to put the Judge in an oil deal (Nixon House Tr. 420-423). Simultaneous with these events, in May of 1979 Dependable Insurance Company moved for summary judgment against Fairchild Construction in the Boam Co. case (House Tr. 3/2/89, 133-140). The motion was denied by Judge Nixon on August 8, 1979 (House Tr. 3/2/89, 149). As a result Fairchild Construction remained in the case with the opportunity to achieve a favorable outcome.

In June of 1979 Judge Nixon conducted a ten-minute hearing in which counsel for Fairchild Construction was present (House Tr. 3/2/89, 141). Judge Nixon advised the parties that he intended to refer the case to Magistrate Roper (Id. at 143-151). However, Judge Nixon continued to rule on pending motions. Magistrate Roper bifurcated trial of the case, and rendered a judgment as to two of the parties on September 6, 1979 (Id. at 153-154). The entire case ultimately settled immediately thereafter through consent of all parties. Fairchild Construction Company received $17,000 under the settlement agreement (Id. at 154-164).

Even after delegating day-to-day responsibility in Boam to Magistrate Roper, Judge Nixon remained involved in the case. Judge Nixon entered an August 8, 1979 summary judgment order in favor of Fairchild Construction (Id. at 149). Judge Nixon also signed the judgment involving other parties on September 7, 1979 (Id at 158); the settlement agreement on September 6, 1979 (Id. at 159-164); the order authorizing the disbursement of funds on

October 12, 1979 (Id. at 165-167); and orders finally dismissing the case with prejudice, including an order dismissing Fairchild Construction Company, on January 30, 1980 (Id. at 169-173).

Judge Nixon was under a clear obligation to recuse himself from proceedings in The Boam Co. case after he solicited an investment with Wiley Fairchild.[20] However, at no point did he seek reassignment of the case or even disclose his relationship with Wiley Fairchild to the other parties (House Tr. 3/2/89, 398-409).

Judge Nixon's failure to observe judicial ethics and the requirements of the disqualification statute in the context of his financial relationship with Wiley Fairchild does not end with the Boam Co. case. His participation in a second case, Jack Seymour v. L & A Contracting Co., et al., is even more disturbing.

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[20] The judicial disqualification statute, 28 U.S.C. Section 455 (reprinted at House Tr. 3/2/89, 410-411), generally requires a judge to disqualify himself in any proceeding in which his impartiality might reasonably be questioned. In addition, Subsection (b) of the statute specifies particular circumstances in which a judge must disqualify himself, including where he has a personal bias or prejudice concerning a party, or where he "has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding."

The Code of Judicial Conduct (reprinted at House Tr. 3/2/89, 412-419) also required Judge Nixon's recusal from Boam or at least disclosure of his relationship with Mr. Fairchild to the other parties in the case. See Canon 3C, governing disqualification, and Canon 5C(4), prohibiting a judge from receiving a private, below-market loan not available to the public, and from receiving a loan from a party in a case pending before him.

During the House proceedings, two experts on judicial ethics, Professors Andrew Kaufman of Harvard Law School and Steven Lubet of Northwestern University School of Law, analyzed the disqualification statute and the Code of Judicial Conduct, and concluded that Judge Nixon acted improperly in continuing to preside over the two cases (Kaufman House Tr., 3/2/89, at 10-23; Lubet House Tr., 3/2/89, at 10-23).

The Seymour case involved severe injuries sustained by the plaintiff due to the collapse of a portion of a bridge. The matter was filed in February 1980 with damages of $6 million sought from six named defendants, including W. R. Fairchild Construction Company (House Tr. 3/2/89, 181-191). The case was originally assigned to Judge Dan Russell, who promptly recused himself because his nephew was an attorney with the law firm that represented Fairchild Construction Company in the case (Id. at 396). The matter was reassigned to Judge Nixon in March 1980 (Id. at 176). By this date, by his own admission, Judge Nixon "definitely" had a firm agreement to enter into a mineral investment with Wiley Fairchild (Nixon House Tr. 424).

Yet again, Judge Nixon failed to recuse himself or even disclose his dealings with Wiley Fairchild to the other parties (House Tr. 3/2/89, 378-385). On July 17, 1980, after preliminary discovery in the case, Fairchild Construction Company moved for summary judgment as to Mr. Seymour's personal injury claims (Id. at 325). Fairchild Construction's motion was not formally opposed by the plaintiff. On September 3, 1980 Judge Nixon granted the motion and rendered written findings of fact and conclusions of law in connection with his order (Id. at 328-337). By virtue of this order, Fairchild Construction had no direct liability for any of the plaintiff's injuries.

There was, however, a cross-claim by a co-defendant against Fairchild Construction for contribution and indemnity. Fairchild Construction moved for summary judgment on this claim as well, but after hearing oral argument Judge Nixon denied the motion on December 4, 1980, finding that "there exists a material issue of fact" requiring trial (Id. at 338, 340). As a result of this ruling, Fairchild Construction remained in the case with potential exposure on the cross-claim (Id. at 381-388).

The litigants in Seymour conducted discovery during 1981 and early 1982, and the case proceeded toward trial. However, in February 1981, without disclosure to the other parties in the case, Judge Nixon consummated his investment and $9500 loan with Fairchild Construction Company (Nixon House Tr. 424-426). Judge Nixon began receiving royalty checks on February 18, 1982 while the Seymour case was pending for trial, without recusing himself or disclosing the receipt of funds to the other parties (Subcomm. Ex. 11). By March 16, 1982, Judge Nixon had received nearly $7500 in royalties and made a $5,000 payment to Fairchild Construction on his loan (Id.)

On April 16, 1982 Judge Nixon conducted a 30-minute pre-trial conference in the Seymour case with all attorneys present, including counsel for Fairchild Construction (House Tr. 3/2/89, 357). Judge Nixon directed counsel to explore the possibility of settlement, and shortly thereafter a pre-trial settlement was negotiated between counsel and approved by Judge Nixon (Id. at 362-377). Under the terms of the settlement, Fairchild Construction made no contribution to a $670,000 settlement payment to Mr. Seymour and was released from all potential liability (House Tr. 3/2/89, 382-388). As of the date of the Seymour settlement, Judge Nixon had received a total of $9,553.39 through his oil investment with Fairchild Construction Co. The bulk of this money was paid to the Judge through four separate Fairchild Construction checks signed by Wiley Fairchild (Subcomm. Ex. 11).

Judge Nixon concedes, as he must, that he should have recused himself from the two cases.[21] The Judge contends that he simply did not notice Fairchild Construction's involvement in the two cases (Nixon Committee Tr. 564-565), a claim that is inconsistent with the many pleadings and orders signed by the Judge that identify Fairchild Construction as a party, as well as hearings and the Seymour pre-trial conference in which Fairchild Construction's attorney was present and actively participated (See, e.g., House Tr. 3/2/89, 61-64). These facts demonstrate the obvious -- that Judge Nixon has no credibility as a witness.

Judge Nixon's failure to disclose his relationship with Wiley Fairchild during the Boam and Seymour litigation is further evidence of a pattern of concealing the "whole truth" about his dealings with Mr. Fairchild. Failure to recuse in only one case involving Fairchild might simply be the result of coincidence and inadvertence. Failure to recuse in two cases, particularly where there are many pleadings and orders bearing the Fairchild name, several orders specifically concerning Fairchild signed by Judge Nixon, and conferences involving counsel for Fairchild, strongly suggests something more than yet another "mistake."

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[21] A third case assigned to Judge Nixon, Transcontinental Gas Pipe Line Corp. v. Mississippi Sate Oil and Gas Board, et al., No. J82-0531(N)(S.D.Miss., Jackson Div.), involved one of the gas fields in which Judge Nixon had an interest as a result of his transaction with Fairchild Construction Company. Fairchild Construction was also an interested party in this case. Judge Nixon recused himself immediately from this case but, significantly, he disclosed only the fact of his interest in the gas field, not his relationship with Wiley Fairchild and Fairchild Construction Company (House Tr. 3/2/89 at 626).

Given Judge Nixon's solicitation of the investment, his gratitude to Wiley Fairchild, his willingness to help Fairchild if he could, his admitted "enthusiasm" for additional investments, and his complete lack of credibility as a witness, it is easy to conclude that Judge Nixon consciously chose not to recuse himself so as to create an opportunity for him to enhance his financial relationship with Fairchild. Fortunately, both cases settled prior to trial, and the ultimate outcome of the two cases does not appear to have been prejudiced by Judge Nixon's involvement (E.g. House Tr. 3/2/89 at 384).

V. JUDGE NIXON'S SO-CALLED "AFFIRMATIVE DEFENSES" OF PROSECUTORIAL MISCONDUCT AND VINDICTIVE PROSECUTION HAVE NO MERIT

In his "First Affirmative Defense" to the Articles of Impeachment, Judge Nixon alleges that he was vindictively targeted for prosecution because of his ruling against the government in a civil condemnation case involving Petit Bois Island. However, typical of his constantly changing position, Judge Nixon has abandoned this defense and properly so, for there is absolutely no evidence of a vindictive prosecution.

As his "Second Affirmative Defense" to the Articles of Impeachment, Judge Nixon contends that he was unfairly targeted by the Department of Justice. Again, however, the Senate heard no testimony that in any way supports this defense.

Judge Nixon claims of prosecutorial misconduct were thoroughly litigated and resolved against him in the post-conviction proceedings. Both the District Court and the Fifth Circuit Court of Appeals rejected all allegations of prosecutorial misconduct and concluded that he received a fair trial (House Exs. 37 and 39).

The record before the Senate confirms that:

1. Wiley Fairchild and Bud Holmes did not lie at Judge Nixon's trial, not did the government ever urge them to do so (Holmes Senate Tr. 90; Holmes House Tr. 227; Fairchild Senate Tr. 47, 75, 77; W. Fairchild House Tr. 187-188). Fairchild and Holmes both emphasized that they told the truth at the criminal trial to the best of their ability. The Senate testimony of Fairchild and Holmes concerning the key events -- their meeting with Judge Nixon concerning the handling of the drug case, and the telephone call that same evening involving Judge Nixon -- was consistent with their prior House and criminal trial testimony.

2. The "scripts" and "testimonial outlines" Respondent mischaracterizes as governmental misconduct were simply documents containing relevant, truthful information used to prepare Wiley Fairchild for his trial testimony. See House Ex. 37, 703 F.Supp. at 563; Weingarten P.C. Tr. 374, 377, 395, 431-436.

3. The government did not "lead" Wiley Fairchild with promises and inducements. Contrary to Respondent's claims, the government did not promise Wiley Fairchild that it would help him obtain a pardon. See 703 F.Supp. at 557; Weingarten P.C. Tr. 380-381; W. Fairchild House Tr. 188. The government did not promise Wiley Fairchild, as part of his plea agreement, that it would do what it could to help Drew in dealing with his drug charges. See 703 F.Supp. at 558; Hess P.C. Tr. 285-286; Little P.C. Tr. 340, 346-347; Weingarten P.C. Tr. 389-390; W. Fairchild House Tr. 188. Nor did the government promise Wiley Fairchild, as part of his plea agreement, that it might dismiss the gratuity charge to which he pled guilty. See 703 F.Supp. at 558; Hess P.C. Tr. 249-251 and 276-278; Weingarten P.C. Tr. 377-378.

During trial before the Senate Impeachment Trial Committee, Judge Nixon's claims of prosecutorial misconduct were proven to be empty rhetoric when he decided not to present the live testimony of John Baltar, who had been his key witness in connection with the misconduct allegations.

Judge Nixon recognized that John Baltar's testimony was not worthy of the Senate's attention for two obvious reasons. First, Mr. Baltar has no first-hand knowledge of any of the facts relevant to this case. Equally important, as emphasized by Chief Judge Nangle in his post-conviction opinion, Baltar is a wholly unreliable witness (Nixon v. U.S., 703 F.Supp. 538, 553-554 (S.D. Miss. 1988), House Ex. 37). Baltar's testimony during the post-conviction proceeding was self-contradictory, and was contradicted by the testimony of other witnesses. Id. Remarkably, Baltar refused to testify truthfully during the post-conviction hearing on the simple point of his friendship with Judge Nixon. Baltar denied being good friends with the Judge, in complete contrast to his prior grand jury testimony, when he freely admitted Judge Nixon was a good friend (Baltar P.C. Tr. 76-79). Similarly, Baltar claimed that prosecutor Jan Little said she would help Drew Fairchild, then one minute later completely retracted this testimony (Baltar P.C. Tr. 85-88).

Judge Nixon's defenses of prosecutorial misconduct are blue smoke and mirrors, designed to distract the Senate from the focus of this impeachment -- the falsity of the Judge's own statements. Judge Nixon, not the Department of Justice, faces removal from office for false or misleading statements. Prosecutorial misconduct by the Department of Justice, even if true as alleged, cannot excuse Judge Nixon's lies to federal investigators, the grand jury, and most recently to the Senate in his sworn testimony before the Impeachment Trial Committee.

CONCLUSION

Judge Nixon lied repeatedly to federal investigators, lied repeatedly under oath before a grand jury, and lied again in his testimony before the Senate. Such a man does not deserve to hold the high office of federal judge. To preserve the integrity of the judiciary and maintain public respect for the law, Judge Nixon must be removed from the bench.

Respectfully submitted,

The United States
House of Representatives

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October 13, 1989

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APPENDIX

IN THE SENATE OF THE UNITED STATES
Sitting as a Court of Impeachment

In re)

IMPEACHMENT OF)
WALTER L. NIXON, JR.)

THE HOUSE OF REPRESENTATIVES' RESPONSE TO JUDGE NIXON'S MOTION TO DISMISS IMPEACHMENT ARTICLE III

The House of Representatives, through its Managers and counsel, responds as follows to the Motion to Dismiss Impeachment Article III filed by Respondent, Judge Walter L. Nixon, Jr.

In his motion, Respondent alleges that Article III should be dismissed because

1. Portions of Article III "do not make out an impeachable offense under Article II, Section 4 of the Constitution;"
2. Portions of Article III are "redundant and multiplicitous" of allegations in Articles I and II; and
3. Article III is "complex," "confusing," "unfair" and "completely unworkable."

Respondent's assertions are wholly without merit. Article III is patterned upon "omnibus" articles traditionally used in judicial impeachments, including the recent impeachments of Judges Claiborne and Hastings. Indeed, the very arguments Respondent raises in his motion were unanimously rejected by the Senate by vote of 93-0 on a similar motion to dismiss filed by Judge Hastings.

Article III charges an impeachable offense, is perfectly proper and should be voted upon by the Senate.

I. ARTICLE III PROPERLY CHARGES AN IMPEACHABLE OFFENSE

A. The Content of Article III

Apparently intent on confusing and misleading the Senate, Respondent suggests that Article III "alleges seventy supposedly impeachable offenses." Memorandum in Support of Motion at p. 2. This is simply not the case. Article III alleges but a single offense.

Article III seeks Respondent's removal from office based upon his concealment of information and the consequences of that concealment. Article III charges Respondent with concealing his conversations with Wiley Fairchild, Carroll Ingram and Forrest County District Attorney Paul Holmes concerning the state criminal drug prosecution of Wiley Fairchild's son, Drew Fairchild. So that Respondent will be fully on notice of the charges against him, Article III sets forth in complete detail the alleged concealment. Article III charges Respondent with concealing information through false or misleading statements in an April 1984 interview with law enforcement officials, and in sworn testimony before a federal grand jury in July 1984. The date, location and specific statements alleged to be false are set forth in Article III.

A total of fourteen (14) separate false or misleading statements are set forth in Article III in support of the charge that Respondent concealed information. Seven (7) occurred during Respondent's 1984 interview. The remaining seven (7) took place during Respondent's grand jury testimony. Of the seven grand jury statements alleged to be false or misleading in Article III, four are also at issue in Articles I and II, which track Respondent's perjury convictions.

Respondent' statement to the grand jury that Mr. Holmes never discussed the Drew Fairchild case with him led to Respondent's conviction on one count of perjury. This same statement, found by the jury to be false beyond a reasonable doubt, is alleged in Article I as a basis for impeachment, and is realleged in Article III (2)(A) as part of Respondent's effort to conceal information.

Respondent also told the grand jury that he had nothing whatsoever officially of unofficially to do with the Drew Fairchild case in Federal court or state court, never had a thing to do with the case at all, and "never talked to anyone, state or federal, prosecutor or judge, or in any way influence anybody" with respect to the Drew Fairchild case. These statements were also found by the jury to be false beyond a reasonable doubt, resulting in Respondent's conviction on a second count of perjury. Article II, which tracks the second perjury count, focuses on these statements alone as ground for impeachment. Article III realleges these statements in subsections (D),(F) and (G) as part of Respondent's efforts to conceal information.

Three of Respondent's grand jury statements alleged to be false or misleading in Article III--subsections (2)(B), (C) and (E)--were not the subject of criminal charges against Judge Nixon, but are alleged in Article III to be part of Respondent's effort to conceal information. Moreover, the seven interview statements appearing in Article III were not the subject of criminal charges, but are also alleged to be part of an effort by Respondent to conceal information.

The consequences of Judge Nixon's concealment of information--that he "has raised substantial doubt as to his judicial integrity, undermined confidence in the integrity and impartiality of the judiciary, betrayed the trust of the people of the United States, disobeyed the laws of the

United States and brought disrepute on the Federal courts and the administration of justice"--are alleged in the second paragraph of Article III. This paragraph is modeled on articles of impeachment from prior cases that focus on the impact of a judge's misconduct on the integrity of the judiciary.

In short, Respondent has mischaracterized the content of Article III. This Article is hardly "complex and confusing," but rather very simple and straightforward. Article III charges Respondent with but one offense. In essence, it alleges that Respondent concealed information through false or misleading statements in an interview and in sworn testimony, impugning the integrity of the judiciary and warranting Respondent's removal from office.

B. The Acts of Respondent Alleged in Article III Clearly Constitute "High Crimes and Misdemeanors"

Respondent's argues that Article III should be dismissed because it fails to state an impeachable offense. Yet Respondent defeats his own argument. In his Memorandum in Support of his Motion, Respondent repeatedly concedes that criminal conduct constitutes an impeachable offense. Respondent thus must agree that the alleged concealment of information by committing perjury before a federal grand jury, a federal crime, must state an impeachable offense. Similarly, the giving of material false statements to federal investigators to conceal information during an interview is both a felony under the criminal law[1] and conduct warranting impeachment.

Respondent does not claim that the concealment of information alleged in Article III cannot, as a matter of law, warrant impeachment. Rather, it appears that Respondent's complaint is only with the second paragraph of Article III and only part of that paragraph, which he claims contains "subjective" allegations of misconduct.[2]

But the House has not charged Judge Nixon with being a generally "bad person," which is Respondent's warped translation of Article III. Memorandum in Support of Motion to Dismiss at 15. Nor is Article III "subjective" in any sense of the word. Respondent isolates certain phrases in the second paragraph of Article III--"raised substantial doubts as to his judicial integrity, undermined confidence in the integrity of the judiciary, betrayed the trust of the people of the United States . . . " [etc.]--and then argues as if the remainder of Article III did not exist.

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[1] U.S.C. Section 1001 provides as follows: "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more that $10,000 or imprisoned not more than five years, or both." Respondent was never charged with this crime, although the facts amply justify prosecution for this offense.

[2] Respondent agrees that the phrase "disobeyed the laws of the United States" states an impeachable offense. Memorandum in Support of Motion to Dismiss at p. 3, fn. 2.

Respondent ignores the key words "by the following," which link the phrases Respondent claims are "subjective" with specific allegations of concealment through false or misleading statements. Given these specifics, Respondent's complaint that Article III is "subjective" and "standardless" is absurd.

Respondent also expresses concern that federal judges not be impeached for "issuing unpopular decisions," "smoking marijuana," "extramarital affairs" or "attending a meeting of the communist party." Memorandum at 16. But a careful review of Article III reveals that Respondent is not charged with such conduct. Concealing information by giving false or misleading statements to a grand jury in sworn testimony and to law enforcement officials in an interview is conduct warranting both criminal sanctions and removal from office. Respondent's suggestion that Article III is "a gross expansion of impeachable offenses beyond the intent of the Framers," Memorandum at 19, is simply nonsensical, particularly given Respondent's own recognition that criminal offenses may warrant impeachment. The Framers would applaud both Judge Nixon's criminal prosecution and his removal from office.

C. Article III is an "Omnibus" Article Traditionally Charged and Voted Upon by the Senate in Impeachments

As Respondent recognizes, the phrases in Article III paragraph 2 that he isolates from the whole and then attacks so vigorously are modeled upon "omnibus" or "catch-all" articles of impeachment presented by the House and voted upon by the Senate in *every impeachment trial* this century that resulted in conviction. With no support, Respondent urges the Senate to defy the long-standing practice of an "omnibus" article that sets out a judge's collective misconduct and describes the effect of his misbehavior on the integrity of the judge and the judicial system as a whole.

Past "omnibus" impeachment articles contain phraseology virtually identical to that alleged in Article III and criticized by Respondent. For example, Judge Halsted Ritter (1936) was charged in a final article of impeachment with misconduct, previously alleged in earlier articles, that had the cumulative effect of "bring[ing] his court into scandal and disrepute, to the prejudice of said court and public confidence in the administration of justice therein, and to the prejudice of public respect for and confidence in the Federal judiciary . . . ."[3] The Senate found Judge Ritter guilty of the omnibus charge.

Similarly, in the 1986 impeachment of Judge Harry Claiborne, the Senate voted upon and convicted Judge Claiborne of an omnibus article (Claiborne Article IV) containing some of the very same language that Respondent here attacks:

> "Judge Harry E. Claiborne, by virtue of his office, is required to uphold the integrity of the judiciary and to perform the duties of his office impartially.
>
> "Judge Harry E. Claiborne . . . has betrayed the trust of the people of the United States and reduced confidence in the integrity and impartiality of the judiciary, thereby bringing disrepute on the Federal courts and the administration of justice."[4]

In the pending impeachment of Judge Alcee L. Hastings, the final article (Article XVII) is an omnibus article alleging that Judge Hastings, through his collective, specified misconduct, did

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[3] Congressional Record, Senate Proceedings, 74th Cong., 2d Sess., March 31, 1936 at 4655 (hereinafter "Ritter Proceedings").

[4] Report of the Senate Impeachment Trial Committee, Hearings before the Senate Impeachment Trial Committee, United States Senate, 99th Cong., 2nd Session, Part 1 of 4 parts, at 9.

> ". . . undermine confidence in the integrity and impartiality of the judiciary and betray the trust of the people of the United States, thereby bringing disrepute on the Federal courts and the administration of justice by the Federal courts."

In the Hastings impeachment, on March 16, 1989, by a vote of 93-0, the Senate resoundingly denied a motion to dismiss the omnibus article in which Judge Hastings raised the very same arguments presented by Respondent here. Judge Hastings, like Judge Nixon, claimed that the omnibus article failed to allege an impeachable offense. The full Senate unanimously rejected this argument.[5]

There is a good reason for the Senate to consider an omnibus article that collects a judge's misbehavior and recites its impact on judicial integrity. As argued by the House Managers in the Ritter proceeding, the omnibus article alleges

> ". . . a substantial doubt as to judicial integrity. . . . We contend that this is the highest crime which a judge can commit on the bench. It is not whether he did

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[5] See Impeachment of Judge Alcee L. Hastings, Motions to Dismiss, 101st Cong., 1st Sess., Doc. No. 101-4, printed February 2, 1989 at 98-105 and 220-21, containing Judge Hastings' written motions and supporting memoranda. Oral argument on the motion appears in 135 Congressional Record No. 29, March 15, 1989, at S2549-S2564.

> this thing, that thing, or the other thing, but whether or not the sum total of the things he has done has made the people doubt his integrity as a judicial officer."[6]

The special duty and standard of conduct required of Federal judges is at the heart of Nixon Article III, just as it has been with prior omnibus articles. The purpose of such an article was perhaps best described by House Manager Peter Rodino in the Claiborne case:

> "Conviction on [Claiborne] Article IV, however, rests on a separate and compelling legal theory, which has roots deeply embedded in the impeachment power. In 1936, the Senate convicted Judge Halsted L. Ritter of bring disrepute upon the Federal judiciary that he had been chosen to represent.
>
> As Members of this body have recognized in prior judicial impeachments, the judges of our Federal courts occupy a unique position of trust and responsibility in our system of government: They are the only members of any branch who hold their office for life; they are purposely insulated from the immediate pressures and shifting currents of the body politic. But with this special prerogative of judicial independence comes the most exacting standard of public and private conduct."[7]

In short, Respondent's complaints concerning those portions of Article III focusing on judicial integrity are completely unfounded.

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[6] Ritter Proceedings, supra, at 4658.

[7] Proceedings of the United States Senate, 99th Cong., 2d Sess., S. Doc. 99-48, at 122.

II. ARTICLE III IS NOT "REDUNDANT" OR "MULTIPLICITOUS"

As described above, of the 14 statements by Judge Nixon alleged to be false or misleading in Article III, four were specifically found by the jury to be false, resulting in Respondent's criminal convictions. These four statements are the basis of Articles I and II and are realleged in Article III. Respondent complains that these allegations in Article III are "redundant" and "multiplicitous."[8] But Respondent is mistaken. In prior impeachments the Senate has regularly considered omnibus articles such as Article III that reallege conduct also at issue in other articles.

Interestingly, Respondent argues that "once a judgment has been rendered in any proceeding, the parties involved cannot relitigate the same issue." Memorandum at 20. Apparently Respondent believes that since the statements set forth in Articles I and II have been found to be false beyond a reasonable doubt by a jury, Judge Nixon cannot relitigate this issue. The sole question for the Senate would then be one of remedy--given that Judge

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[8] The statements set forth in Article III subsections 2(A), (D), (F) and (G) form the basis for Articles I and II. However, Respondent also moves to dismiss subsection 2(E) of Article III, a statement that was not specifically found by the jury to be false. Since Subsection 2(E) is not set forth in Articles I and II, Respondent's motion as to this subsection makes no sense whatsoever.

Nixon's statements were false, does this conduct warrant impeachment?

Although Respondent correctly notes that *res judicata* applies here, he errs in concluding that the House may not re-allege conduct in an omnibus article such as Article III. Indeed, the full Senate considered and soundly rejected this exact point on March 16 of this year, when it denied by vote of 93 to 0 the Motion to Dismiss Article XVII (the omnibus article) filed by Judge Alcee L. Hastings.[9]

Respondent raises the very same worn argument rejected by the Senate in Hastings and earlier impeachments. The final articles of impeachment in the Archbald, Ritter, Claiborne, Hastings impeachments all realleged acts of misconduct separately alleged in other articles, and the Senate voted to convict on the omnibus article in Archbald, Ritter and Claiborne. There is simply no reason to reverse this well-established practice. Indeed, as noted by the House Managers during the Ritter proceedings, it is quite proper for the House to place before the Senate, in a single article, "the sum total of the things [a judge] has done . . . ." so that the Senate may view the misconduct in its entirety.[10] The Senate Chair during the Ritter proceedings recognized that even though the omnibus article contains allegations set forth in other articles, the omnibus article is worthy of the Senate's independent consideration. The Chair stated, "[a] point of order is made as to the Article VII in which Respondent is charged with general misbehavior. It is a separate charge from any other charge.[11] Significantly, in the Ritter impeachment, the Senate voted to convict only upon the final article.

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[9] *See* note 5, *supra*.

[10] *See* note 6, *supra*.

In sum, Respondent's complaints of "multiplicity" and "redundancy" are unfounded. Article III is a separate and distinct charge that focuses on the integrity of the judiciary, and alleges that Respondent's cumulative misconduct and the devastating consequences of his conduct on the judiciary warrant his removal from office. Even if Respondent is found "not guilty" on Articles I and II, the Senate may quite properly examine the four statements of Respondent at issue in those Articles and realleged in Article III, as well as the ten other statements set forth in Article III, in determining whether Judge Nixon's misconduct *in toto*, and its effect on judicial integrity, warrants a vote of "guilty" as to Article III.

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[11] Ritter Proceedings, *supra*, at 637-38.

III. ARTICLE III IS NEITHER COMPLEX NOR CONFUSING

In his final argument, Respondent suggests that Article III is unduly "confusing." This contention is simply untrue. Article III is straightforward, places Respondent squarely on notice of the specific statements alleged to be false or misleading, and is by no means "confusing."

Respondent suggests that Article III is unfairly "duplicitous." He relies upon criminal cases in support of this argument. Yet his criminal analogy is not an apt one. Impeachment is not a criminal proceeding. Double jeopardy, the basis for criminal case law dealing with duplicitous indictments, is not a problem here, since unlike the criminal law in impeachment there is but a single sanction (removal from office) that can occur but once regardless of the number of articles.

Finally, Respondent claims that Article III "effectively destroys Judge Nixon's right to be removed only by a two-thirds vote." Memorandum at 23. This identical argument was raised by Judge Hastings in his Motion to Dismiss Article XVII and unanimously rejected by the Senate on March 16. The Ritter proceedings also make clear the Senate may properly find a judge guilty of cumulative misconduct set forth in an omnibus article, even if the

Senate acquits the judge on each allegation individually. Judge Nixon's own mathematics establish the point. See his Memorandum at 23. When confronted with the cumulative evidence of Respondent's misconduct, if 70 Senators believe Judge Nixon should be removed from the bench, the necessary two-thirds of the Senate will have agreed that Respondent is no longer fit to hold the esteemed position of Federal judge, even if the 70 disagree as to which of the fourteen statements by Respondent at issue in Article III are false. Judge Nixon may argue that this a "clearly unacceptable outcome," Memorandum at 23, but the Constitution dictates otherwise.

CONCLUSION

Judge Nixon's Motion to Dismiss Article III should be denied. Article III is a separate charge and a proper omnibus article consistent with prior impeachment cases. Judge Nixon's arguments are the same as those recently raised by Judge Hastings and unanimously rejected by the Senate. Article III, in its entirety and present form, should be presented to the Senate for vote along with Articles I and II.

Respectfully submitted,

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IN THE SENATE OF THE UNITED STATES
Sitting As A Court Of Impeachment

In re
IMPEACHMENT OF
WALTER L. NIXON, JR.

BRIEF OF JUDGE NIXON
IN OPPOSITION TO THE ARTICLES OF IMPEACHMENT

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I.

INTRODUCTION

At first glance, Judge Walter L. Nixon, Jr.'s opposition to these Impeachment Articles may look like a long, uphill climb. He has been convicted on criminal charges of giving false testimony to a grand jury that are similar to Impeachment Articles I and II. He has served more than 19 months in custody, although he is scheduled for release on November 21, 1989. And the three Impeachment Articles against him were approved by the House's customary overwhelming margin.

But once past the superficial appearances of this case, the picture changes dramatically. The Senate will search in vain for a corrupt act that would explain Judge Nixon's supposed false testimony; it will search in vain for an allegation that Judge Nixon abused his office as a Federal judge; indeed, the Senate will find only that Judge Nixon has been, in the words of one House Manager, "a Federal judge for 20 years of excellent reputation." Part 2, at 318.

1. Overview of the Trial

With no hint of corruption or illegal action by Judge Nixon, what could this impeachment proceeding be about? The answer is both simple and depressing. Judge Nixon was the target of an irresponsible, anonymous allegation to the FBI that triggered a multi-million dollar federal investigation that unearthed no crimes. No crimes at all. Judge Nixon was so certain of his innocence of any crime that he voluntarily appeared as the first witness before the grand jury in order to answer all questions.

But the prosecutors were not daunted by their failure to unearth any crimes. Instead, they used the grand jury to generate supposed crimes. They put together a case against Judge Nixon that combined a completely unfounded corruption charge (indeed, it was so unfounded that the prosecutor has since admitted that point, _see_ pp. 50-51, _infra_), with three charges that Judge Nixon gave false testimony before the grand jury. They gave sweet plea bargains to two thoroughly unreliable witnesses, Bud Holmes and Wiley Fairchild, and induced them to change their testimony to be more negative towards Judge Nixon. They concealed a variety of evidence that would have helped Judge Nixon's defense, or would have revealed the incredibility of Messrs. Holmes and Fairchild. _See_ pp. 48, 63-65, 70-72, _infra_.

Then they tried the case, playing for a compromise verdict. And they got it. The jury threw out the obviously bad corruption charge, and one false statement charge, but Judge Nixon was convicted on two false statement counts.

2. _Overview Of The Impeachment Articles_

The House Managers boast of the care they devoted to this case before the Impeachment Articles were approved. But one House Manager has revealed that a majority of the House

Subcommittee made up their minds before hearing all the evidence. Part 2, at 318. [1] And there is no indication that any of the other 426 members of the House thought about this case any longer than it took to determine that Judge Nixon had been convicted in court.

The Impeachment Articles themselves are an affront to the Constitution. Articles II and III repeatedly chop up Judge Nixon's statements in a misleading and unfair manner, sapping his testimony of the meaning established by the context of his remarks. Indeed, Article III charges that a single clause in a complex sentence constitutes an intentionally false, material statement warranting impeachment.

Even more surprising, after the Senate trial was completed, Articles II and III(2)(G) had to be rewritten to correct a critical error in the transcription of Judge Nixon's testimony. That correction fundamentally transforms the meaning of his testimony. The original, incorrect

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[1] The structure of each record citation in this Brief is:

"[Witness], Part __, Vol. __, at [page no.]"

"Part 2" is the record of the Senate committee's evidentiary hearings, "Part 3" is the exhibits admitted during the Senate proceedings, "Part 4A" (in two volumes) is the testimony and exhibits from Judge Nixon's criminal trial, "Part 4B" (in three volumes) is the testimony from the impeachment hearings in the House, and "Part 4C" is the testimony from the post-conviction hearings. Parts 3 and 4C, however, have not yet been furnished as bound copies. Consequently, the House's exhibits are cited as "House Ex.", Judge Nixon's exhibits are cited as "Nixon Ex." and the post-conviction testimony is cited "Post-Conviction [page no.]".

Article alleged that Judge Nixon falsely testified that he had not spoken to a prosecutor or judge to influence the Drew Fairchild case; the corrected Articles recognize that his actual testimony was that he had not influenced the case, a very different statement. Thus, the entire House had to adopt amended Impeachment Articles, which was done on the unanimous consent calendar on October 5; not a single Representative questioned why such extraordinary action was needed.

Moreover, Impeachment Article III, like Impeachment Article XVII in the Hastings case, is designed to be unfair. It lumps together fourteen overlapping allegations, and prefaces them with disparaging remarks about Judge Nixon that do not allege impeachable offenses. A separate Motion to Dismiss, (Attachment 1 to this Brief) presents our constitutional objections to Article III: (i) that it is so confusing as to be unfair and to defeat the requirement of a two-thirds vote for conviction; and (ii) that it fails to state impeachable offenses by Judge Nixon.

More generally, throughout this proceeding the House Managers have strayed beyond the issue whether Judge Nixon committed particular offenses, seeking instead to provoke a sense of unease or embarrassment over the prospect of Judge Nixon remaining on the bench. Article III invites the Senate to remove him from office for allegedly raising "doubt" as to his "judicial integrity," having "betrayed the trust" of the people of the United States, and having "undermined confidence" in and "brought disrepute on" the judiciary. [2]

The impeachment power is strictly limited to cases of "Treason, Bribery, or other high Crimes and Misdemeanors." U.S. Const., Art. II, Section 4. The Constitution does not permit the Senate to convict Judge Nixon because of vague feelings that he acted inappropriately or dishonorably or even unlawfully. The House must carry the burden of proving that Judge Nixon committed "high Crimes and Misdemeanors." Judge Nixon need not prove his worthiness to hold office, as would be the case in a confirmation hearing. [3] The Senate may disregard all of Judge Nixon's evidence and defenses and still acquit him because the House Managers have failed to support their allegations with sufficient facts.

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[2] The Committee said that these loose allegations are merely "prefatory" and are not the subject of these proceedings. See Impeachment Trial Committee Disposition of Pretrial Motions First Order at 4 (July 25, 1989). Article III remains unchanged, however, and the quoted language constitutes one of the bases for Judge Nixon's Motion to Dismiss Impeachment Article III. A very similar Article (Article XVII) was recently rejected by the Senate in Hastings.

[3] This point was made recently by the Chairman of the Senate Judiciary Committee during debate on the nomination of former Senator Tower as Secretary of Defense: "This is not a criminal trial where the presumption of innocence is with the defendant and the burden of proof is with those who allege misconduct. Nor are we in an impeachment proceeding where I assume a similar standard should apply." 135 Cong. Rec. S2459 (daily ed. Mar. 9, 1989).

3. The Accusations And Judge Nixon's Defense

The substance of each of the Impeachment Articles is that Judge Nixon spoke falsely during an FBI interview in April 1984 and in grand jury testimony in July 1984 when he did not describe three brief conversations he had with Wiley Fairchild and Bud Holmes on March 11, 1983. Because those conversations, two in person and one on the telephone, concerned Mr. Fairchild's allegation that Mr. Holmes was somehow "blackmailing" him, we refer to them as the "blackmail conversations."

House Managers cannot carry their burden of proving that Judge Nixon's failure to mention the blackmail conversations constituted an intentional, material false statement. Their proof fails on every element of their case.

(i) Judge Nixon has testified consistently that the blackmail conversations did not occur to him during the FBI interview or the grand jury testimony, although the conversations have since been called to mind. His inadvertent failure to think of the blackmail conversations certainly cannot be termed an intentional false statement, particularly when he was never asked a direct question about the conversations and when he was a completely voluntary witness anyway, betraying no intent to conceal facts.

(ii) Neither the House Managers' witnesses nor the federal prosecutor from Judge Nixon's criminal case can meet the House Managers' standard of "testimonial perfection." None of the House Managers' witnesses recalled the blackmail conversations when they were interviewed by the FBI in April 1984; none of them told the grand jury about the blackmail conversations when they testified before the grand jury in July 1984. None of them has been accused of perjury for failing to mention those matters on either occasion. Just like those witnesses, Judge Nixon should not be judged by the House Managers' standard of testimonial perfection.

(iii) The House Managers' case relies entirely upon the testimony of Bud Holmes and Wiley Fairchild. In view of their self-contradictions, testimonial reversals, plea bargains, and plain disregard for the truth, neither witness has any credibility. The Senate cannot convict Judge Nixon on the testimony of Mr. Holmes or Mr. Fairchild.[4]

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[4] Because credibility issues are so important to this case, and because Judge Nixon's right to trial by the full Senate is guaranteed by Article I, Section 3, Clause 6 of the Constitution, we hereby formally renew our motion for a full trial before the full Senate, which previously was denied by the Senate Impeachment Trial Committee.

(iv) The information that Judge Nixon supposedly withheld from the FBI and the grand jury was of no particular significance. Neither the federal prosecutors nor the House Managers has claimed that the blackmail conversations constituted any kind of offense. The insignificance of the blackmail conversations reinforces the conclusion that Judge Nixon, like the House Managers' witnesses, plausibly explains that he did not think of the conversations at the interview and the grand jury; their insignificance also, by itself, undercuts any claim that the failure to disclose them was material and could constitute an offense.

(v) Judge Nixon's grand jury testimony and statements during the investigative interview were literally truthful. For justice to be done, the Senate must review the full testimony of Judge Nixon, not the fragments and snippets that the House Managers have assembled in the Impeachment Articles. When his full testimony is reviewed, it is clear that -- putting aside Judge Nixon's intent or state-of-mind at the time he spoke -- the words he spoke were literally true and cannot be the basis for his removal from office.

The weakness of the House Managers' case probably accounts for their disappointing tactic of "prosecution by omission." Over and over, the House Managers fail to mention critical evidence that undercuts their case. This Brief will confront this tactic, including the most outrageous instance -- the House Managers' completely erroneous claim that Judge Nixon has changed his testimony in the Senate trial. In order to sustain that baseless claim, the House Managers have to omit from their Brief numerous passages from Judge Nixon's prior testimony that demonstrate the consistency of his testimony. Perhaps this lamentable tactic is merely a measure of the House Managers' desperation, but the Senate must be unmistakable in its condemnation of such tactics.

4. The House Managers Must Satisfy A Stringent Standard Of Proof

The Impeachment Articles charge Judge Nixon with intentionally making material false statements in the April interview and the July grand jury testimony. The House Managers bear the full burden of proof on each element of the alleged offenses:

-- that Judge Nixon made the statements with an actual intent to conceal information and deceive the investigators and the grand jury;

-- that the allegedly false or concealed information was "material";

-- that the statements were, in fact, "false and misleading".

Although the Constitution does not prescribe a specific standard of proof for impeachments, the Senate must respect the constitutional significance of this case. The impeachment provisions directly pit two coordinate branches of government against each other, giving the legislative branch ultimate power over the judiciary, and a demanding standard is necessary.

The House Managers argue for a lax standard of proof because an impeachment proceeding supposedly "is not so serious as a criminal trial." But as Senator Specter observed in Hastings:

> Certainly a strong argument can be made that where impeachment articles are based on charges that constitute violations of criminal law, the criminal law standard of proof ought to be applicable. . . . When senators are called upon to vote on an article of impeachment, we do not say "aye" or "nay" as we do on all other occasions. Instead, we articulate our vote by saying "guilty" or "not guilty." I have no doubt that the Senate's vote of guilty in an impeachment is to the officeholder as much a stigma and condemnation as the result in any criminal case, and that consequently such a decision should only be reached based on a standard of proof that does not permit people to have doubt about whether an innocent man has been unjustly condemned or punished.

Statement of Sen. Specter (Oct. 19, 1989) (emphasis added). See also C. Black, Impeachment: A Handbook 17 (1974).

Perversely, the House Managers justify a lesser standard of proof because "This is not simply an employment dispute between Congress and Judge Nixon." House Br. at 63. That is exactly our point. If this were only an employment dispute, a lesser standard of proof ("preponderance of the evidence") would apply here. But this is not an mere employment dispute; it is a grave confrontation between two great branches of government. Critical constitutional values, including the independence of the judiciary, require a more stringent standard of proof.

The burden of proof is in no way eased by the jury's verdict in the criminal case. The Constitution vests in the Senate the "sole Power to try all Impeachments," and thereby requires an independent review of the facts by the Senate. As Hamilton explained in The Federalist, the impeachment clause contemplates an impeachment proceeding following on the heels of a judicial trial, and designates the Senate to hear the impeachment trial and provide an independent determination of guilt or innocence:

> Would there not be the greatest reason to apprehend that error, in the first sentence, would be the parent of error in the second sentence? That the strong bias of one decision would be apt to overrule the influence of any new lights which might be brought to vary the complexion of another decision? Those who know anything of human nature will

> not hesitate to answer these questions in the affirmative; and will be at no loss to perceive that by making the same persons judges in both cases, those who might happen to be the objects of prosecution would, in a great measure, be deprived of the double security intended them by a double trial.

For the Senate to defer to the jury's verdict would be an abdication of its unique responsibility for impeachments. As Senator Hatch stated in Claiborne: "The separation of criminal and impeachment proceedings, in my mind, precludes this body from merely deferring to the existence of a criminal conviction. We have the duty to reach our own independent conclusion about the facts which gave rise to these charges." 132 Cong. Rec. S15763 (Oct. 9, 1986). See id. at S15767 (Sen. Specter).[5] In Hastings, the House Managers succinctly stated this principle (emphasis added):

> As the House has repeatedly stressed, impeachment proceedings are separate and independent from the judicial process. The verdict of a criminal jury is not determinative, for otherwise it would undermine the sole power of the Senate to try all impeachments. In analogous situations, the Senate has recognized this principle and refused to defer to a decision of the courts.[6]

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[5] Thus, the Senate acquitted Judge Claiborne under an impeachment article based solely on the prior conviction. See 132 Cong. Rec. S16241 (Oct. 14, 1986) (Sen. McConnell); id. at S15874 (Sen. Matsunaga).

[6] Amended Final Pretrial Statement of the House of Representatives, In re Impeachment of Judge Alcee L. Hastings 14-15 (filed June 23, 1989) (footnote omitted) (emphasis

The wisdom of wholly separating the impeachments from any prior judicial trial is particularly apparent here, where the judicial trial was biased by the inclusion of unfair charges against Judge Nixon (Nixon Ex. 80) and the suppression of exculpatory evidence (see pp. 44-48, 63-65). The Hastings conviction, voted despite his jury acquittal, establishes that the prior jury verdict has no relevance.

5. Outline Of This Brief

This Brief first will introduce Judge Nixon (pp. 14-16). We then will confront the House Managers' tactic of prosecution by omission, and will present the full evidence demonstrating both the consistency of Judge Nixon's testimony and how the House Managers cannot prove that he intended to mislead anyone by his statements (pp. 17-37). We also will show how no witness in this proceeding can satisfy the House Managers' standard of "testimonial perfection," (pp. 37-40) and will review other critical facts that have been omitted by the House (pp. 40-57). Then we will explain the complete lack of credibility of the House Managers' key witnesses, Bud Holmes and Wiley Fairchild (pp. 58-73). Finally, we will examine each Impeachment Article and explain how the House Managers have failed to prove that the supposed false statements were (i) material, or (ii) not true (pp. 73-100).

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added).

II.

JUDGE WALTER L. NIXON, JR.

Walter L. Nixon, Jr. was appointed to the federal bench by President Lyndon Johnson in 1968, at the age of 39, after building a thriving law practice. Nixon, Pt. 2, at 226-27. In 1982, he became Chief Judge of the Southern District of Mississippi. Id. at 228. He also has served as president of the Fifth Circuit District Judges Association and was a member of the Fifth Circuit Judicial Council. Nixon, Pt. 2, at 228; Pt. 4B, Vol. I, at 417-18.

As the House Managers recognize, Judge Nixon is perceived in his community as an outstanding judge of the highest integrity. Ingram, Pt. 2, at 182; Part 2, at 318. Leaders of the Mississippi bar praised Judge Nixon's reputation for conducting his court fairly and without any question of bias. Eppes, Pt. 2, at 206; Denton, Pt. 2, at 209-10; Beer, Pt. 2, at 213-14.

As was confirmed by the uniform testimony of two leaders of the Mississippi bar, a high-ranking career FBI agent, a fellow judge, and a top Mississippi law enforcement official, Judge Nixon's character and reputation for truthfulness and veracity is, and always has been, excellent. Eppes, Pt. 2, at 205; Denton, Pt. 2, at 209-10; Beer, Pt. 2, at 213; Graves, Pt. 2, at 222; Saxon, Pt. 2, at 224-225. He has never been known to do anything to cause any embarrassment to his court or himself. Nixon Ex. 63, at 34; Holmes, Pt. 2, at

111-12. As one witness succinctly stated, "a judge's integrity and his reputation for truthfulness is on the line every day . . . . But I can tell you that on both sides of the bar, both the defense bar and the plaintiff's bar, his [Judge Nixon's] reputation for truthfulness is excellent." Denton, Pt. 2, at 209. Judge Nixon has been a force for civil rights in Mississippi, presiding over the desegregation of the Mississippi Highway Patrol and of public school systems. Nixon, Pt. 2, at 293.

Judge Nixon also is regarded as a conscientious, hard-working member of the bench, who for more than twenty years has successfully met the challenge of one of the heaviest caseloads in the federal courts. Denton, Pt. 2, at 209; Beer, Pt. 2 at 213; Nixon, Pt. 2, at 227. Judge Nixon testified about his great enjoyment of and commitment to the work of a trial judge. Nixon, Pt. 2, at 228; Pt. 4B, Vol. I, at 419. Because of his passion for the trial courtroom, in 1982 he turned down the Reagan Administration's offer to elevate him to the Court of Appeals. Nixon, Pt. 2, at 228.

Judge Nixon was born and raised in Biloxi, Mississippi, where he still lives. After a parochial school education, he attended Louisiana State University and Tulane University Law School. He served honorably in the United States Air Force during the Korean conflict, and was discharged as a Captain. He remained active in the Air Force Reserves, rising to the rank of Major before retiring, as he was required to do, when he became a judge. A devoted family man, Judge Nixon has helped to raise seven children, who now range in age from 12 to 39.

Through a lifetime of living and working in southern Mississippi, Judge Nixon has acquired a large circle of professional and social friends and acquaintances, and he did not feel it incumbent upon himself to give up those community ties upon ascending the bench. House Ex. 2, p. 71. Consequently, he continued to be an active member of his community, attending numerous professional and social functions, including hunting and fishing trips, with lawyers and others. Nixon, Pt. 2, at 227-28. As the House Managers' own witness testified, such informal cordiality is customary for judges in Mississippi, and is considered perfectly proper and wholesome. Ingram, Pt. 2, at 181; Nixon, Pt. 4B, Vol. I, at 419; Nixon Ex. 68A, at 6.

III.

THE HOUSE MANAGERS' CASE IS BUILT ON INCONSISTENCIES AND OMISSIONS

The House Managers' case is built on two foundations: First, a double standard for testimonial perfection that neither their own witnesses nor Judge Nixon's prosecutor can meet; and, second, a seriously incomplete factual presentation that simply omits the many facts that do not fit the theory of the prosecution. By these dubious methods, the House Managers urge the Senate to perpetuate a terrible injustice. The Senate, however, can neither embrace the double standard nor shut its eyes to those facts that do not fit the House Managers' theory.

The underlying facts of this case concern (i) Judge Nixon's purchase of oil interests from Wiley Fairchild, (ii) the Drew Fairchild drug case; and (iii) the federal investigation of Judge Nixon. To focus this Brief, we will not repeat our narrative presentation of the facts in our Post-Trial Summary of Facts (Attachment 2). Instead we will concentrate on correcting the House Managers' most grievous inconsistencies, distortions and omissions. We will therefore address:

-- That Judge Nixon's testimony regarding his state of mind has been completely consistent throughout this case;

-- That the House Managers apply a standard of testimonial perfection that no witness in this case -- including Judge Nixon's prosecutor -- can satisfy;

-- That the date of the blackmail conversations and telephone call from Bud Holmes' farm had to be in 1983;

-- That the House Managers omit material evidence concerning the oil and gas purchase, the blackmail conversations, and Bud Holmes' misconduct.

A. Judge Nixon's Testimony Regarding His State Of Mind Has Remained Completely Consistent Throughout This Case

The House Managers' most conspicuous and most outrageous distortion of the record is their repeated claim that Judge Nixon changed his testimony in the Senate trial and concocted a fresh set of lies to try to win this case. Thus, the House Managers proclaim that Judge Nixon's testimony was "newly minted for the Senate trial and a complete reversal of his prior position." House Br. at 63. The House Managers achieve this distortion by concealing the full record of Judge Nixon's prior testimony and misconstruing those passages they do present. Surprisingly, the Senate Committee appears to have been deceived in part by these sharp tactics; the Report suggests that Judge Nixon's testimony on this point "contrasts" with his earlier statements and also omits important prior testimony by Judge Nixon. We turn first to a full presentation of the record evidence.

1. Judge Nixon's Testimony: While Testifying, He Did Not Think Of The Blackmail Conversations Or The Telephone Call, But They Were Somewhere In His Memory

The House Managers repeatedly attack a straw man: their erroneous description of Judge Nixon's defense as a "claim of amnesia." House Br. at 82. Judge Nixon has never asserted that he completely forgot about the events that he is charged with having failing to disclose to the prosecutor. Again and again before the Senate Committee, Judge Nixon took pains to explain that point (Nixon, Pt. 2, at 273):

> The VICE CHAIRMAN. I had thought that, perhaps, the thrust of your case would be that, yes, you did have conversations with both Wiley Fairchild and with Bud Holmes on the date in question; yes, you did remember those discussions at the time that you were interviewed by Mr. Weingarten and at the time of the grand jury; however, in your own mind, those discussions were so frivolous or minor, *de minimis* that they did not really constitute discussions of the *Drew Fairchild* case.
>
> Now, my understanding of what you have just told is something different than that, that what you have testified to today is that at the time of the interrogation by Mr. Weingarten and at the time of the grand jury you had no recollection of any discussion, even a *de minimis* one, about Drew Fairchild and his case with either Wiley Fairchild or with Bud Holmes.
>
> Judge NIXON. You're correct, Senator, with the exception of the word recollection, recall at the time. I had no recall of that. I can't say that it was forgotten forever, because obviously it was [not], because when this matter came up in February of 1985, I never

> denied that any of that happened. I never stated that I ever forgot it completely. I said I had no recall of it at that time, and nothing was asked of me that would trigger a recall.

Thus, Judge Nixon draws a crucial distinction between having no memory of something and not thinking of it at the time. This distinction may perhaps seem overly fine, even lawyerly. But Judge Nixon is a lawyer and a judge. In fact, in response to Sen. Danforth's questioning, several witnesses who have known Judge Nixon for many years testified that Judge Nixon chooses his words carefully. Eppes, Pt. 2, at 207; Denton, Pt. 2, at 211.

Under similar circumstances, some people might testify that they had no memory whatever of the blackmail conversations. But to a careful witness like Judge Nixon, such testimony would be inaccurate. It would mean, for instance, that his recollection would not have been prompted by a direct question whether he had any conversations about blackmail. Judge Nixon repeatedly has testified that, had the prosecutor asked a question with the word blackmail in it, he likely would have thought of the blackmail conversations. To say he had wholly forgotten the conversations would thus, for Judge Nixon, be inaccurate. Judge Nixon has tried to testify precisely and accurately on this point.

2. Judge Nixon Has Always Given The Same Testimony On This Point: Trial Testimony

Not content with misconstruing Judge Nixon's testimony to the Senate Committee, the House Managers distort his prior testimony to support their claim that his defense is "newly-concocted." House Br. at 82. The House Managers point to the jury trial, where Judge Nixon answered "yes" to a series of questions:

> "[W]ere you aware of that [the conversations with Wiley and Bud Holmes] when you were in the grand jury?";
>
> "[W]ere you aware at that time did you remember those events?";
>
> "[D]id you recall the allegation by Wiley Fairchild" about blackmail during the interview with the prosecutor; and
>
> "[W]hen you gave this response on page 56 [of the interview transcript] you knew that there had been a meeting between you and Wiley Fairchild where in Fairchild makes this blackmail allegation?".

House Br. at 77-79, quoting Nixon Trial Tr. 1585-86, 1590-91, 1709-10, 1733. Standing alone, this testimony might be manipulated to suggest that he consciously chose not to disclose the blackmail conversations to the grand jury, as the House Managers suggest.

But the House Managers -- and even the Senate Report -- omit crucial trial testimony, which was Judge Nixon's very first testimony on this issue, given before the above-quoted questions were asked (Nixon, Pt. 4A, Vol. II, at 1576):

> Q: At the time of this interview [in April 1984], at the time you were on the phone with Ingram, Phillips, Holmes, was the telephone call anything that you even thought of at that point in time?
>
> A: No.

This critical testimony establishes that at trial Judge Nixon testified that he did not think of the telephone call with Wiley Fairchild during the April interview.

The House Managers -- and the Senate Report -- also fail to mention a second important passage in Judge Nixon's trial testimony: that when he met with his lawyer to prepare for his July grand jury testimony, Judge Nixon also did not think to mention the blackmail conversations. Nixon, Pt. 4A, Vol. II, at 1728. This is further evidence that Judge Nixon testified at trial, as he did to the Senate Committee, that the blackmail conversations had not been called to mind when he went to the grand jury.

This trial testimony destroys the House Managers' claim of recent fabrication and illustrates Judge Nixon's consistent distinction between forgetting something completely and just not thinking of it. Without that distinction, Judge Nixon's trial testimony makes no sense. The portrait of Judge Nixon, drawn by those witnesses who know him, is one of a careful man who tries to speak accurately. The only explanation that makes sense of all of his trial testimony is that he has intended from the very beginning to tell the truth and not mislead anybody as to his mindset at the time he made the allegedly false statements. At worst, he is guilty of having been unclear -- surely not an impeachable offense.

3. Judge Nixon Has Always Given The Same Testimony On This Point: House Testimony

When they turn to Judge Nixon's testimony before the House Subcommittee, the House Managers once again simply omit vital testimony which precisely tracked his trial testimony and his later Senate Committee testimony. Accordingly, the House Managers never mention the following testimony (Nixon, Pt. 4B, Vol. I, at 443):

> Q: Now at the time you gave that interview with Mr. Weingarten -- and this is April of 1984 -- were you aware, at some level, that you had had this previous conversation you have described in March of 1983 with Mr. Fairchild concerning his blackmail allegation?
>
> A: Well, of course I knew it had occurred. It was, I am sure, in my recollect, but it wasn't foremost of course in my mind.

And he explained the same point on cross-examination by Impeachment Counsel (id. at 506), in a passage also omitted by the House Managers:

> Q: You admitted, didn't you, Judge, at the time of this interview, that you did recall, or you had it in your mind -- you had not forgotten about the conversation with Wiley Fairchild and the subsequent phone call from the farm back to Wiley that evening?
>
> A: Well, of course it was in my recollect, my mind. I knew it happened is what I

> mean, but it wasn't foremost in my mind, at all, because of the reasons I've already stated. I thought it was nonsense. I thought it was a misunderstanding. It was apparently cleared up, and over with that evening, and I heard nothing more about it.

Again, in an effort to be as precisely accurate as possible, Judge Nixon drew the important distinction between forgetting something entirely (which was not the case for him) and not having a matter come to mind (which was the case).

In their further distortion of Judge Nixon's testimony, The House Managers point to testimony in which Judge Nixon offered possible reasons for his failure to think of the blackmail conversations. See House Br. 79-80. By omitting the above-quoted testimony, the House Managers suggest that Judge Nixon told the House that he made a deliberate decision not to mention the conversations to the grand jury. Id. at 79. Judge Nixon's actual testimony describes no such conscious decision. Indeed, when read together with the testimony quoted above, it is clear that Judge Nixon was merely pointing out aspects of the blackmail conversations that might explain why he did not think of them, as he also did in his testimony before the Senate Committee.

In sum, Judge Nixon has never suggested that he completely forgot about the blackmail conversations at the time of his interview and grand jury testimony. Judge Nixon always has distinguished between a complete loss of memory and a failure to recall. He always has said that the blackmail conversations and telephone call simply did not come to mind, although they would have if something had triggered his recollection of them.

4. The Evidence Strongly Corroborates Judge Nixon's Testimony That The Conversations Never Came To Mind

For both the April interview and the July grand jury testimony, there is substantial evidence that corroborates Judge Nixon's truthful testimony that the blackmail conversations did not come to mind.

a. The April Interview

First, the investigators' conduct of the interview impeded Judge Nixon from recollecting the blackmail conversations. The investigators caught Judge Nixon completely cold, without any notice or warning. He was thus attempting to reconstruct events of as much as four years before, without any advance preparation. White-Spunner, Pt. 2, at 18, 40; Nixon, Pt. 2, at 238, 263, 274; House Ex. 1, p. 41.

Moreover, the questioners did not draw Judge Nixon's attention to the blackmail conversations, even though they knew of Mr. Fairchild's blackmail allegations. Out of the fifty pages of interview transcript, forty dealt exclusively with the details of the supposedly "imbalanced" oil transaction and the supposedly suspicious dating of the transaction. House Ex. 1, pp. 26, 33-41, 47-51. In covering the Drew Fairchild case, Mr. Weingarten focussed on the transfer of the case from federal to state court, a matter about which Judge Nixon knew nothing. Id. 27-31, 42-44. Judge Nixon repeatedly asked how he, as a federal judge, could have influenced the state's initiation of a prosecution, (House Ex. 1, at 45, 47, 48, 50) demonstrating that his thoughts and statements centered on his official conduct as a judge.

The investigators asked no specific question that related to the blackmail conversations and never mentioned the blackmail allegation by Wiley Fairchild, although they had been apprised of it only days before. FBI Agent White-Spunner could not explain the puzzling failure to raise the blackmail subject, and admitted that it was plainly relevant to the interview. White-Spunner, Pt. 2, at 36-37, 44-45.

The House Managers stress the general statement by Mr. Weingarten that the government was looking at the Drew Fairchild case "top to bottom," and argue that Judge Nixon should have figured out that Mr. Weingarten really was asking about the blackmail conversations. But that remark hardly focused Judge Nixon's attention on the blackmail conversations. When Judge Nixon asked what he could have done as a federal judge to influence the state prosecution, Mr. Weingarten responded unhelpfully, "If someone wanted to use their imagination, I suppose they, they could think of things." House Ex. 1, at 48. Judge Nixon cannot be convicted for having failed to exercise sufficient "imagination."

Judge Nixon's conduct during the interview reveals a man who believes he has nothing to hide. Judge Nixon agreed to the interview even though he had no advance notice of it. He did not head for the airport, or for the pay telephone booth. He did not ask for time to think about whether to grant the interview, or to consult with an attorney. He was perfectly willing to have the interview taped. White-Spunner, Pt. 2, at 18-19; Nixon, Pt. 2 at 238-39.

Judge Nixon volunteered that he purchased three oil interests from Wiley Fairchild. House Ex. 1, at 2, 4, 8. In response to lengthy questioning about the transaction, Judge Nixon unhesitatingly responded as fully as memory permitted. He volunteered that he paid $9,500 for the properties, (House Ex. 1, p. 5) that two of the oil interests turned out profitably for him (House Ex. 1, pp. 2, 4), and that the third did not. White-Spunner, Pt. 2, at 37. Judge Nixon volunteered that he purchased the oil interests with money borrowed from Mr. Fairchild. House Ex. 1, p. 5. Judge Nixon even volunteered twice that there was something "unorthodox" about the transaction, (House Ex. 1, pp. 6, 9) which is the sort of comment that catches an investigator's attention and totally belies any intent to conceal. White-Spunner, Pt. 2, at 37. Finally, Judge Nixon voluntarily produced documents for review by the investigators. House Ex. 1, p.50. Judge Nixon acted and spoke like a person with nothing to hide.

b. The Grand Jury Appearance

Judge Nixon's failure to think of the blackmail conversations during his grand jury testimony is similarly consistent with external events and ordinary experience.

First, Judge Nixon *volunteered* to testify before the grand jury, a fact never mentioned in the House Managers' Brief. House Ex. 42, at 9 (Stipulation No. 79); Nixon, Pt. 2, at 240, 287, 297. Judge Nixon asked to testify in order to set the record straight in the face of devastating publicity about the investigation. Nixon, Pt. 2, at 240-41. At the close of his testimony, Judge Nixon went so far as to invite the grand jury to ask any questions it wanted "with reference to the Drew Fairchild case." House Ex. 2, at 79. A witness with something to hide does *not* volunteer to go before a grand jury: the risks of being trapped into a damaging admission or later being prosecuted for perjury are too great, particularly for one familiar with grand jury proceedings, like Judge Nixon.

Second, the claim that Judge Nixon consciously concealed the blackmail conversations is contrary to common sense. Judge Nixon was an experienced judge and an able attorney. If he had thought of the blackmail conversations, he would have realized that the investigators were likely to talk to Wiley Fairchild, Bud Holmes and Carroll Ingram. To be confident that the blackmail conversations never would come to light, Judge Nixon would have to make the improbable calculation that all three would either forget or cover up the conversations. Indeed, all three ultimately confirmed those events, and none has stated that Judge Nixon ever told them how to testify.

Third, as was true during the April interview, much of the questioning (64 out of the 75 pages) focussed Judge Nixon's attention on the transaction with Wiley Fairchild, its timing and documentation. House Ex. 2, at 1-44, 57-75. The prosecutors' questions reveal their later-abandoned theory that the oil transaction was an inducement for favors by Judge Nixon, and that the deeds had been backdated to cover up a corrupt arrangement. Indeed, Judge Nixon's main goal in volunteering to testify was to make clear that the transaction was perfectly lawful and proper. Nixon, Pt. 2, at 240-41.

The prosecutors again failed to ask any specific question relating to the blackmail conversations. They did not even mention the blackmail allegations, although the very next day they questioned Carroll Ingram at some length about a possible blackmail scheme involving Wiley Fairchild and Bud Holmes. Nixon Ex. 31, at 64-66. The House Managers have never offered any explanation or defense for the prosecutors' failure on this score.

Fourth, Judge Nixon's grand jury testimony is totally at odds with the mindset of someone trying to hide the blackmail conversations. He testified at length about the transaction with Mr. Fairchild. He even volunteered that Mr. Fairchild had mentioned the possibility of a further oil investment, although nothing ever came of it. House Ex. 2, at 56.

c. The House Managers Have Offered No Plausible Basis For Concluding Judge Nixon Purposely Concealed The Blackmail Conversations

To meet their burden of proving an intent to deceive on the part of Judge Nixon, the House Managers must show that he (i) understood that the prosecutor's question called for the blackmail conversations, and (ii) that he intentionally concealed that information when he answered.[7] The only direct evidence on this issue is Judge Nixon's consistent testimony at trial, before the House Subcommittee, and before the Senate Committee that the blackmail conversation simply did not come to mind. If he did not think of the conversations, he surely did not understand that the questions related to the blackmail conversations and had no intent to conceal them. This testimony is reinforced by Judge Nixon's insistence that he surely would have described the blackmail conversations had they occurred to him.

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[7] The statute penalizing false statements before a grand jury requires that the statement have been make "knowingly," 18 U.S.C. § 1623, as does the statute for false statements to a federal investigator, see 18 U.S.C. § 1001, and all other similar statutes, see 18 U.S.C. § 1002-1031. Intent is thus a core element of such offenses. See, e.g., United States v. Lange, 528 F.2d 1280 (5th Cir. 1976) ("A violation of § 1001 requires proof that the defendant had the specific intent to make a false or fraudulent statement" (citations omitted)); United States v. Dudley, 581 F.2d 1193 (5th Cir. 1978) (lying to a grand jury is a "specific intent" crime and standard of intent required under the federal perjury statute, 18 U.S.C. § 1623(a), is same as under § 1001); United States v. Lentz, 524 F.2d 69 (5th Cir. 1975).

The House Managers' attempt to meet this direct evidence is a hodge-podge of improbable inferences and far-fetched presumptions, all supposedly demonstrating that Judge Nixon must have intentionally concealed the blackmail conversations. For example, the House Managers suggest that by repeatedly and categorically denying involvement in the Drew Fairchild case, Judge Nixon revealed an intent to conceal the blackmail conversations. To the contrary, Judge Nixon's certainty and self-righteousness reflected his firm belief in the truthfulness of his testimony.

The House Managers also argue that, given the passage of three months between the interview and the grand jury appearance, something must have brought the blackmail conversations to Judge Nixon's mind. Two things need to be said about this contention. First, the contention itself implicitly concedes that it is entirely plausible that Judge Nixon would not have thought of the conversations in the April interview, when the judge spoke without warning or notice.

Second, the argument ignores what was happening during those three months. The press was shrieking with government leaks that the oil investment was a corrupt deal, the same subject as the April interview. Nixon, Pt. 2, at 240; Holmes, Pt. 2, at 134; Holmes, Pt. 4A, Vol. I, at 811-12; White-Spunner, Pt. 2, at 40-41. The leaks reached the point where Judge Nixon had to secure the highly unusual relief of a gag order. Nixon Ex. 74. Judge Nixon primarily was focussed on proving his innocence of the specific allegations and stopping the government leaks. Surely a peripheral incident like the blackmail conversations easily could have escaped his attention.

Moreover, when Judge Nixon met with his attorney to prepare for his grand jury proceeding, the blackmail conversations never even occurred to him to raise with his attorney. Nixon, Pt. 4A, Vol. II, at 1728. Surely an investigative target who is concerned about a certain event would discuss that event, above all else, with his attorney before voluntarily giving grand jury testimony.

In addition, after the interview and after informing the prosecutor he would do so, Judge Nixon called Carroll Ingram and Bud Holmes. Nixon, Pt. 4A, Vol. II, at 1714; Pt. 2, at 240. Judge Nixon asked both Mr. Ingram and Mr. Holmes if they knew what the investigation of the Fairchild matters was about. Both Mr. Ingram and Mr. Holmes knew of the blackmail conversations. Yet neither man reminded Judge Nixon of the conversations. Ingram, Pt. 2, at 167-68; Holmes, Pt. 2, at 105, 132-33, 146-47; Nixon, Pt. 2, at 240, 285-86. Three months later, when both Mr. Ingram and Mr. Holmes appeared before the grand jury, they still did not testify about it.[8]

Furthermore, no adverse inference can be drawn from Judge Nixon's decision, on advice of counsel, not to volunteer to testify a second time before the grand jury in February 1985 when the blackmail conversations finally were brought to his attention. By February 1985, Wiley Fairchild had entered a plea of guilty to a crime he did not commit and Judge Nixon plainly was the ultimate target of the investigation. No prudent person would voluntarily have returned to the grand jury at that point.

Lastly, not one witness told the Senate Committee that there was anything improper about the blackmail conversations. Indeed, all the witnesses agreed that, in the South Mississippi community, that sort of incident is not at all unusual. Holmes, Pt. 2, at 133; Ingram, Pt. 2, at 180, 184; Beer, Pt. 2, at 217; Nixon, Pt. 2, at 237, 242; Nixon Ex. 68A. Judge Nixon did not use his office in any way: the conversations occurred on a purely personal level and had no impact on any matter in the Federal court. In short, Judge Nixon had no reason to fear a Mississippi grand jury's knowledge of the incident.

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[8] The House Managers argue lamely that Judge Nixon cannot be believed because he gave erroneous testimony in the jury trial regarding his whereabouts on May 14, 1982, and because he failed to recuse himself from two litigations involving Fairchild Construction Co. As to the former, we note Representative Gekas's observation in Hastings that honest mistakes regarding specific facts always occur. 135 Cong. Rec. S13624 (daily ed. Oct. 18, 1989); Judge Nixon's core testimony regarding his state of mind in the interview and grand jury, however, has not changed, as demonstrated above at pp. 19-26.

As to the recusal issue (House Br., pp. 92-99), Judge Nixon told the Senate Committee that he failed to notice Fairchild Construction Co.'s incidental involvement in two complex cases and thus did not recuse himself when he could have. The House has brought no charge on this issue, and indeed could not do so: the House Managers' own expert testified that an inadvertent failure to recuse is no basis for impeachment. House Hearing March 2, 1989 at 48. Moreover, when Judge Nixon was aware of Fairchild Construction's presence in litigation, he did recuse himself. See House Br. at 98 n. 21; Nixon, Pt. 2, at 306-07; Nixon Ex. 12.

The only evidence presented to the Senate Committee on the propriety of Judge Nixon's conduct was an opinion rendered by Prof. Geoffrey Hazard of Yale Law School, the leading expert on judicial ethics and a draftsman of the Model Code of Judicial Ethics. Part 2, at 202-04. Prof. Hazard states:

> In the circumstances of this case, I believe Judge Nixon's act of relating Wiley Fairchild's blackmail allegation to Bud Holmes would [] not be held to constitute lending the prestige of his judicial office to a private interest. The prosecution of Drew Fairchild was a State court matter to which Judge Nixon had no official connection. Judge Nixon apparently was approached by Wiley Fairchild on a personal basis because he was a long-time friend of Bud Holmes, not because he was a Federal judge. Judge Nixon evidently spoke to Holmes on the same basis. What Judge Nixon was "lending" appears to have been his position as a long-standing friend and professional colleague of Bud Holmes and not the prestige of his judicial office. As a State prosecutor, Holmes had no matters pending before Judge Nixon, and

> normally he would understand the Judge's remark as having been made as a personal friend. Judge Nixon's actions would not allow others to convey the impression that they could influence him in his judicial office, since the events did not involve any of his judicial duties.
>
> My opinion that there was no violation of Canon 2(B) is reinforced by the context of law practice in less urban parts of the country, such as the Southern District of Mississippi. In those areas, social and personal relations between lawyers and judges, and between them and non-lawyer acquaintances tend to be more intimate, relaxed and informal than they are in larger metropolitan areas. In a more urban setting, a judge might simply decline to hear out Wiley Fairchild's initial grievance or to mention it to Bud Holmes, but in a face-to-face community Judge Nixon's handling of the matter seems unremarkable. Accordingly, there is little basis for an impression that Wiley Fairchild was in a special position to influence Judge Nixon. For all of these reasons, my opinion is that Judge Nixon did not violate Canon 2(B).

Nixon Ex. 68A, pp. 5-6 (emphasis added). Prof. Hazard also was asked to consider Judge Nixon's conduct under the sharply-contested version of events given by Bud Holmes. He stated (id. at 7-8) (emphasis added):

> . . . my opinion remains that no ethical violation is present. When Judge Nixon spoke with Holmes, he spoke about a state court matter with an old friend, and not in a context in which he could be misunderstood to be lending his judicial office to further a private interest. Holmes' suggestion that he could pass the case to the files was neither requested nor invited by Judge Nixon. Moreover, the long delay between the conversation and Holmes' act of passing the case to

> the files leads me to question whether the conversation with Judge Nixon properly may be characterized as a cause of Holmes' passing of the case to the files. That long delay, combined with the existence of an immediate cause for the passing of the case to the files (the complaints of Bill Porter in December 1982), leads me to conclude that Judge Nixon's actions did not convey or permit others to convey that they were in a special [sic] under Canon 2(B).

In response, the House Managers diffidently offer prior testimony by their own ethics experts. Although reasonable minds apparently can differ on the propriety question here, Judge Nixon is being impeached by the Senate for allegedly intentional false statements and the House Managers must show a motive to conceal. The leading expert on judicial ethics deems Judge Nixon's actions proper; that fact certainly bolsters the judge's statement that he saw no cause for embarrassment and thus had no motive to dissemble.

Two leaders of the Mississippi bar, a retired career FBI agent, a fellow federal judge, and a high-ranking Mississippi law enforcement official testified unanimously to Judge Nixon's excellent character and widespread reputation for truthfulness and veracity. Eppes, Pt. 2, at 205; Denton, Pt. 2, at 209; Beer, Pt. 2, at 213; Graves, Pt. 2, at 222; Saxon, Pt. 2, at 224. The House Managers cross-examined each character witness, establishing nothing more earthshaking than that they had no first-hand knowledge of the facts. The House Managers offered no rebuttal character witnesses. The testimony as to Judge Nixon's character for truthfulness and veracity thus stands wholly undisputed, and his testimony should be believed.

B. The House Managers Seek To Apply To Judge Nixon A Standard Of Testimonial Perfection That No Prosecution Witness, Or The Prosecutor, Can Satisfy

Judge Nixon stands accused of failing to testify about three not-very-important exchanges he had many months before on a subject that he did not associate with the investigation. The House Managers complain that Judge Nixon "did not reveal," "did not disclose," and "failed to disclose" the blackmail conversations. House Br., pp. 45-46, 49. The House Managers thus ask the Senate to hold Judge Nixon to a standard of testimonial perfection, based on total recall. The completely unrealistic nature of that standard is demonstrated by the failure of any prosecution witness, including Judge Nixon's prosecutor, to meet it.

1. No Prosecution Witness Thought Of The Blackmail Conversations And Telephone Call During The July Grand Jury Testimony

Every single fact witness called by the House Managers was interviewed by the FBI in the spring of 1984 (as Judge Nixon was), and testified before the grand jury in July of 1984 (as Judge Nixon did). And each of those fact witnesses -- Carroll Ingram, Bud Holmes, and Wiley Fairchild -- "did not reveal," "did not disclose," and "failed to disclose" the blackmail conversations, giving reasonable explanations for not doing so.

Mr. Fairchild said that he just did not remember the blackmail conversations until after his indictment, while he was trying to strike a plea bargain with the federal government. Fairchild, Pt. 2, at 69-70; Pt. 4B, Vol. I, at 183, 214. Mr. Fairchild recalled that the prosecutors told him that he had to provide a "smoking gun" on Judge Nixon in order to get a plea bargain. Mr. Fairchild said he "lay awake nights" trying to think of something to tell them. Fairchild, Pt. 2, at 71; Pt. 4B, Vol. I, at 187, 193, 214; Post-Conviction 191, 193. Finally, months after his grand jury testimony, Mr. Fairchild remembered the blackmail conversations.

Mr. Ingram said, in response to a question by Sen. Mack, that he accurately told the grand jury that he had not discussed Drew Fairchild's case with Judge Nixon because he did not think he had had such a discussion; Mr. Ingram added that, while he was before the grand jury, he did not even think of the exchange he did have (Ingram, Pt. 2, at 193) (emphasis added):

> So quite frankly, in the grand jury room, when I was asked that question, I honestly said that I had not had any discussion with Judge Nixon, because I hadn't. And what's more than that, probably that particular phone call at that time probably did not even go through my mind that I had had with him.

We note that Mr. Ingram thereby drew the same distinction that Judge Nixon draws between forgetting something completely and simply not having it "go through my mind" during the testimony.

Mr. Holmes explained that he did not mention the phone call to the FBI or the grand jury because he was not asked about it. Holmes, Pt. 2, at 136.

None of these witnesses has been accused of lying when they "failed to disclose" the blackmail conversations to the FBI or the grand jury. Yet the House Managers ask the Senate to convict Judge Nixon of intentionally giving false statements when his actions and testimony are indistinguishable from those of the prosecution witnesses. The Senate cannot embrace this unreasonable double standard.

2. The Prosecutors Cannot Meet The House Managers' Standard For Testimonial Perfection

Both FBI Agent White-Spunner and Prosecutor Weingarten flunk the House Managers' standard of testimonial perfection. During his Senate testimony, Agent White-Spunner was unable to recall important events during Judge Nixon's investigation. He excused his failure of recollection with the statement, "this has been pretty far from my mind," (White-Spunner, Pt. 2, at 41) a phrase that echoes Judge Nixon's testimony that the blackmail conversations just did not come to his mind.

When Mr. Weingarten testified before the House Subcommittee, he was asked whether he had "any involvement" in an investigation of Petit Bois Island which was conducted simultaneously with the Fairchild/Nixon investigation, and was heard by the same grand jury. Mr. Weingarten completely denied any such involvement (Weingarten, Pt. 4B, Vol. I, at 62-63) (emphasis added): "I had no official responsibility [for Petit Bois Island] whatever. I never interviewed any witnesses. I never appeared in the grand jury in the Petit Bois case or anything like that." Mr. Weingarten betrayed no uncertainty on this point (id. at 63):

> Mr. STEWART: So you never questioned any witnesses concerning Petit Bois Island before the grand jury?
>
> Mr. WEINGARTEN: No.

But Mr. Weingarten was mistaken. He questioned Bud Holmes about Petit Bois Island during two separate grand jury sessions, one in September 1984 and one in February 1985. Nixon Ex. 33, pp. 20-28; Nixon Ex. 46, pp. 65-67. If the House Managers' standard for testimonial perfection is to be applied even-handedly, Mr. Weingarten must be prosecuted for perjury before the House Subcommittee.

C. The Date Of The Blackmail Conversations

As recognized by Committee Report (pp. 51-52), a major evidentiary dispute concerns the date of the blackmail conversations and the phone call from Bud Holmes' farm. If those events occurred in 1983, as Judge Nixon recalls and as the weight of circumstantial evidence establishes, then Judge

Nixon could not have influenced Bud Holmes' decision to pass Drew Fairchild's case to the files since that event occurred in late 1982. Thus, there would be no basis for Articles II and III(2)(G), which allege that Judge Nixon falsely denied that he influenced Drew's case. [9]

The House Managers prominently feature the testimony of Bud Holmes (and only Bud Holmes) that the phone call occurred in May 1982. House Br. at 32-33. But the House Managers' presentation of the evidence on this point is incomplete, and ignores extensive evidence -- much of it from the House Managers' own witnesses -- that flatly contradicts Mr. Holmes' dating of the phone call. We review this question in some detail because it sheds important light both on the credibility of Mr. Holmes, the House Managers' central witness, and on the true nature of this prosecution.

We also stress that Judge Nixon's criminal trial turned almost entirely upon this narrow factual issue. Prosecutor Weingarten told the jury that the government "staked our case" on the assertion that the phone call from Bud Holmes' farm occurred before Drew's case was passed to the files. Nixon Ex. 62, p. 1974.

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[9] Now that the House has corrected those provisions, the date of the telephone call has become directly relevant to Articles II and III(2)(G). See, pp. 87-92, 100, infra. The amended Articles accuse Judge Nixon of falsely denying that he influenced Drew's case, which makes the date of the telephone call potentially controlling.

1. Omission By The House Managers: Publicity

Although the House Managers never mention it, three witnesses have testified unequivocally that the blackmail conversations and phone call occurred when there was publicity over the Drew Fairchild case.

Wiley Fairchild testified that when he spoke with Judge Nixon about his blackmail suspicions, he was terribly upset about publicity concerning Drew Fairchild's case. Fairchild, Pt. 2, at 78; Pt. 4B, Vol. I, at 177; Pt. 4A, Vol. I, at 483, 529. Mr. Fairchild admitted that the publicity about passing Drew's case to the files was especially upsetting because it implied that Mr. Fairchild himself had done something improper to secure that outcome. Fairchild, Pt. 2, at 60-61.

Rodney Fairchild, Wiley's brother, was present at Wiley's office when Judge Nixon arrived. Next morning, Wiley reported to Rodney that he had told Judge Nixon about his blackmail suspicions. Rodney Fairchild recalls that the meeting occurred at the time of the publicity over Drew Fairchild's case being passed to the files. Nixon Ex. 77.

Judge Nixon recalls that when Wiley referred to the blackmail suspicion, Mr. Fairchild said he was tired of having the Fairchild name "drug through the media" and that, as Mr. Fairchild spoke, Judge Nixon recalled that there had been recent publicity about the Drew Fairchild case. Nixon, Pt. 2, at 232-233, 250, 255.

This is critical evidence. Both Wiley Fairchild and Bud Holmes agreed that there was no publicity about Drew Fairchild's case throughout 1982. Fairchild, Pt. 4A, Vol. I, at 629; Pt. 2, at 66-67; Holmes, Pt. 2, at 124; Pt. 4B, Vol. I, at 257; Nixon Ex. 76. In fact, nothing newsworthy happened in the case throughout 1982; Drew's sentencing was continued several times because of his health problems. House Ex. 18. The only newspaper and television coverage occurred in January of 1983, after the case was passed to the files. Nixon Ex. 15, 16, 76.

Thus, all three witnesses refute Bud Holmes' testimony -- on which the House Managers rely -- concerning the date of the phone call. Moreover, this testimony squarely supports the conclusion that the phone call and blackmail conversations occurred in 1983, after the publicity about Drew Fairchild's case. The House Managers do not even admit that this evidence exists.

2. Two More Omissions By The House Managers: Carroll Ingram

a. Mr. Fairchild's Blackmail Suspicions

When Wiley Fairchild told Judge Nixon about his blackmail suspicions, he said that Carroll Ingram might be in on the blackmailing. Fairchild, Pt. 2, at 63; also Nixon, Pt. 2, at 233, 238. Mr. Fairchild testified that he had no such suspicions of Mr. Ingram until Christmas 1982, when Mr. Ingram brought him the order passing Drew's case to the files. Fairchild, Pt. 4A, Vol. I, at 629, 634, 638; Pt. 2, at 55, 60, 67. After Mr. Ingram brought that order to him, and after the publicity about Drew Fairchild's case in January of 1983, Mr. Fairchild did suspect Mr. Ingram of involvement in the blackmail, and Mr. Fairchild told that to Judge Nixon.

Again, the evidence not mentioned by the House Managers squarely establishes that the blackmail conversations and the phone call had to happen in 1983. Mr. Fairchild certainly could not have told Judge Nixon about his suspicions of Carroll Ingram until those suspicions existed, and those suspicions did not exist until Christmas 1982. This omitted evidence also cannot be reconciled with Mr. Holmes' testimony that the conversation and phone call happened in May of 1982.

b. Mr. Ingram's Own Recollection

Mr. Ingram has testified that, based on passing references by Judge Nixon and Wiley Fairchild to the blackmail conversations, he thinks of them as happening in late 1982, but they could have occurred three or four months on either side of that time. Ingram, Pt. 2, at 165-66; Pt. 4A, Vol. I, at 1150; Pt. 4B, Vol. I, at 401-03, 412. Again, the House Managers never mention this testimony, which is consistent with the conclusion that the phone call occurred in 1983, and cannot be reconciled with Bud Holmes' testimony that the phone call happened in May of 1982.

3. More Omissions By House Managers: Wiley Fairchild's Agony Over The Date Of The Phone Call

The House Managers completely suppress Wiley Fairchild's tortured attempts to date the blackmail conversation and phone call. The House Managers never mention (a) that the federal prosecutors instructed Mr. Fairchild to testify that the phone call happened before Drew's case was passed to the files, and that scripts were prepared to help him learn this testimony, and (b) that, despite the prosecutors' pressure and scripts, on several occasions Wiley Fairchild has testified that the blackmail conversations and phone call occurred after Drew's case was passed to the files.

a. The Prosecutors Scripted Wiley Fairchild On What To Say

At a plea-bargaining session with prosecutors on November 1, 1984, Wiley Fairchild agreed with the prosecutors' statement that the phone call from Holmes' farm "had to occur before the passing to the files," Post-Conviction 37, even though Mr. Fairchild had never said that before. Id. at 49. John Baltar, Mr. Fairchild's assistant and a major participant in the plea-bargaining sessions, recalls that the prosecutor wanted to make sure that Mr. Fairchild would date the phone call before Drew's case was passed to the files. Id. at 48. At the prosecutor's direction, Mr. Baltar prepared two scripts for Wiley

Fairchild to study before testifying, one for use before his grand jury appearance in November 1984 (Nixon Ex. 37) and one for use before his testimony at Judge Nixon's trial (Nixon Ex. 59).

The November 1984 script sets forth with arrows and yellow highlighting that the phone call occurred before Drew's case went to the files. As Mr. Baltar recalled the coaching process:

> Mr. Fairchild had to learn that that's where he had to put these occurrences, between those two dates. It was kind of hard for him to remember that because they were different from the dates he had given.

Post-Conviction 54.

b. Mr. Fairchild's Testimony That The Telephone Call Happened After Drew's Case Was Passed To The Files

Despite the direct prosecutorial pressure and scripting, Wiley Fairchild still has testified that the blackmail conversations and phone call occurred after Drew's case was passed to the files. On cross-examination during Judge Nixon's trial, Mr. Fairchild repeatedly gave that testimony, (Fairchild, Pt. 4A, Vol. I, at 655, 659-60) until he flipped back to the version dictated to him by the prosecutors.

Even more compelling, during the post-conviction hearing last year, Mr. Fairchild admitted that the phone call was made "after it [Drew's case] was passed to the files." Post-Conviction 202 (emphasis added). After acknowledging that he had testified to the contrary at Judge Nixon's trial, Mr. Fairchild explained that he testified falsely at trial to please the prosecutor (Post-Conviction 214):

> Q. Let me ask also about your trial testimony that the call from Bud Holmes' farm came before Drew's case was passed to the files. Why did you give that testimony?
>
> A. The same reason.
>
> Q. And what reason is that?
>
> A. To please Weingarten [the prosecutor].
>
> Q. Was it truthful at the time?
>
> A. No.

Mr. Fairchild explained that he lied about the date because "I was just scared. He [Weingarten] makes me scared." Post-Conviction 209. On cross-examination, Mr. Fairchild did not mince words about his perjury (id. at 216-17):

> Q. . . . . Mr. Fairchild, did you testify truthfully at trial to the best of your knowledge and ability?
>
> A. No.
>
> Q. You intentionally lied at trial?
>
> A. Well, I was led to believe that what I was going to say would be all right.
>
> Q. So you intentionally lied at trial, is that what you are saying?
>
> A. That's what I said, what I said wasn't the truth.
>
> Q. And you knew it wasn't true when you said it?

A. Yeah.

Q. And you said it anyway?

A. Huh?

Q. And you said it anyway?

A. Yeah.

By the time he testified before the Senate, Mr. Fairchild was trying to change his testimony on this point one more time, a development that raises some of the many serious issues concerning the credibility of the House Managers' witnesses. See pp. 59-65, infra. Nevertheless, Mr. Fairchild has testified on two different occasions that the blackmail conversation and the phone call occurred after Drew's case was passed to the files; his testimony to the contrary was dictated by the prosecutors, learned from written scripts, and given out of fear.

4. More Omissions By The House Managers: Bud Holmes' Pre-Plea Bargain Testimony

Although the House Managers adopt Bud Holmes' testimony that the blackmail conversations and phone call occurred on May 14, 1982, they do not disclose that this testimony contrasts with Mr. Holmes' testimony before he made his plea bargain. Before the prosecutors got Mr. Holmes under their thumb, he told the grand jury that the phone call happened in the spring of either 1982 or 1983. Nixon Ex. 46, p. 53.

5. More Omissions By The House Managers: Judge Nixon's Memory And Supporting Evidence

The House Managers also fail to mention either Judge Nixon's testimony concerning the date of the phone call, or the considerable corroborating evidence.

Judge Nixon always has testified that the blackmail conversations and phone call occurred on March 11, 1983, after a Hattiesburg jury returned a verdict in the bank robbery trial of Douglas "Chico" Patterson, over which Judge Nixon presided. Nixon, Pt. 2, at 232; Pt. 4B, Vol. I, at 433; Pt. 4A, Vol. II, at 1529-30. This recollection is powerfully reinforced by evidence not available at trial, and recovered from the FBI on the eve of the Senate trial, that Bud Holmes called Judge Nixon's office that day at 12:10 p.m., leaving the message that he would "wait in his office" for Judge Nixon's call. Nixon Ex. 17.

Judge Nixon recalled that, because he had just completed paying off the loan from Mr. Fairchild, he decided to drop in on Mr. Fairchild. Nixon, Pt. 2, at 232; House Ex. 6. Judge Nixon also recalls that he was concerned about getting back home because his wife, Barbara, recently had undergone periodontal surgery. Nixon, Pt. 2, at 232.

After he saw Wiley Fairchild, Judge Nixon drove by Bud Holmes' farm to borrow some Hank Williams, Sr. records. Nixon, Pt. 2, at 233-34. Bud Holmes confirms that Judge Nixon borrowed those records, but does not recall if that occurred when the phone call happened. Holmes, Pt. 2, at 130; Pt. 4A, Vol. I, at 917-18.

All of this evidence is omitted by the House Managers; all of it establishes that the blackmail conversations occurred in 1983, after Drew's case was passed to the files.

D. House Managers' Omissions Concerning The Oil And Gas Purchase, The Blackmail Conversations, And Bud Holmes' Misconduct

The House Managers also omit much evidence concerning Judge Nixon's business transaction with Mr. Fairchild, the blackmail conversations, and Bud Holmes. Through these omissions, the House Managers attempt to deny the innocent character of the oil and gas transaction, to cover up the many contradictions of Mr. Holmes' version of the blackmail conversations, and to ignore Mr. Holmes' misconduct. In summary fashion, we will correct these omissions.

1. More Omissions: The Oil And Gas Transaction

Their most glaring omission concerning the oil investment is the unanimous testimony that the sale of oil interests to Judge Nixon had nothing to do with Drew Fairchild's case. Wiley Fairchild has always insisted on this point (Nixon Ex. 30, pp. 38, 65; Nixon Ex. 27; Fairchild, Pt. 4B, Vol. I, at 194-95; Fairchild, Pt. 2, at 68) as have Carroll Ingram, (Ingram, Pt. 2, at 172, 177) and Judge Nixon (Nixon, Pt. 2, at 245). In fact, the federal prosecutor told the jury at trial that although the government initially thought there was such a connection, "at this point it's clear that there is no such connection." Nixon Ex. 62, p. 1878. The prosecutor later admitted to a university audience that the illegal gratuity charge was not proved at trial. Nixon Ex. 80.

Nevertheless, the House Managers attempt in many small ways to portray the transaction in a poor light. They point out that Mr. Fairchild directed changes in the draft deeds for the oil interests, including an increase in the acreage and a changed date for the transaction. House Br., pp. 19-20. But they never disclose that the draft deeds had inaccurately reflected the acreage Mr. Fairchild intended to sell (Fairchild, Pt. 4B, Vol. I, at 164; Ingram, Pt. 2, at 163) or that the new date reflected the time of the oral agreement between Judge Nixon and Mr. Fairchild for the transaction. Nixon Ex. 30, pp. 58-59; Fairchild, Pt. 2, at 86; Ingram, Pt. 2, at 187. Indeed, the House Managers never disclose that every witness who testified on this point, including three prosecution witnesses, agreed that such dating is customary in the oil industry. Fairchild, Pt. 4A, Vol. I, at 502; Pt. 4B, Vol. I, at 165, 196, 203; Pt. 2, at 86-87, 187; Ingram, Pt. 4A, Vol. I, at 1060-61; Massey, Pt. 4A, Vol. II, at 1406-08; Jarvis, Pt. 4A, Vol. I, at 320.

The House Managers also attempt to portray Judge Nixon's purchase of the oil investments as somehow involving an improper benefit. House Br. at 22. This effort completely ignores the risky nature of oil investments; as the House

Managers point out, many oil investments do not pay off, and most of Judge Nixon's have been unsuccessful. House Br. at 25. But when an oil investment is successful, it ordinarily pays off very well, as happened here for two of the three interests purchased by Judge Nixon.[10]

More troubling, however, the House Managers do not mention that Wiley Fairchild realized an extraordinary profit on these oil interests, ranging from 1,300 per cent profit to 8,000 per cent profit, on the interests he sold to Judge Nixon. Nixon Ex. 32A; Fairchild, Pt. 2, at 67; Pt. 4B, Vol. I, at 195, 201; Nixon Ex. 30, p. 41. Indeed, Wiley Fairchild has always insisted that he charged Judge Nixon a "fair price" (Fairchild, Pt. 4A, Vol. I, at 565, 592-93; Pt. 4B, Vol. I, at 196, 199-200; Pt. 2, at 68), that the sale was not a gift (Fairchild, Pt. 4B, Vol. I, at 195), and that it was not made with any intent to corrupt Judge Nixon or gain advantage in any lawsuit, (Fairchild, Pt. 4B, Vol. I, at 195, 204; Nixon Ex. 22, p. 2).

Finally, the House Managers continue to try to coax some corrupt meaning from Judge Nixon's entirely innocent remark to Mr. Fairchild that if he could help Mr. Fairchild he would be glad to do so, and that if he could not help Mr. Fairchild in a given situation "I'll just tell you." House Br. at 23. Mr. Fairchild told the Senate Committee that he understood Judge Nixon's statement to be no more than a routine expression of personal courtesy from a person with whom he had done business. Fairchild, Pt. 2, at 70.

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[10] With respect to the repayment of the loan, Judge Nixon cannot win. According to the House Managers, the fact that Judge Nixon did not start paying the loan back earlier is suspicious and the converse fact that he did not pay it back later is also suspicious. House Br. 23. The undisputed evidence shows, however, that Wiley Fairchild offered the loan on his own initiative, and set the loan terms; the loan had a three-year, lump-sum repayment term; Judge Nixon was not required to pay until that time; and he made payments when he could afford to do so in order to reduce interest.

2. The Blackmail Conversations And Phone Call

The House Managers repeat Bud Holmes' claim that he met with Judge Nixon and Carroll Ingram at the district attorney's office in the late afternoon, they had a few drinks, and then Mr. Holmes drove Judge Nixon out to Holmes' farm. House Br. at 33. But the House Managers never disclose that both Carroll Ingram and Judge Nixon dispute Mr. Holmes' version. Mr. Ingram has testified that he never went to the district attorney's office with Judge Nixon, (Ingram, Pt. 2, at 172; Pt. 4A, Vol. I, at 1152) and Judge Nixon recalls driving to Holmes' farm by himself. Nixon, Pt. 2, at 234; Pt. 4A, Vol. II, at 1546.

When they get to the phone call to Wiley Fairchild, the House Managers state that "After receiving the phone call from Judge Nixon, Mr. Fairchild thought his son's case would be passed to the file." House Br. at 35. Omitted, however, is Mr. Fairchild's consistent testimony that no one on that telephone call told him that Drew's case would be passed to the file, (Fairchild, Pt. 2, at 64, 80; Pt. 4B, Vol. I, at

180, 210) and that he did not even know that there was such a thing as "passing a case to the files" until Drew's case actually was passed to the files. Fairchild, Pt. 2, at 59. That testimony contradicts any suggestion that Mr. Fairchild concluded from the phone call that Drew's case would be passed to the files.

The House Managers also claim that Bud Holmes' "recollection of the telephone call was virtually identical to Wiley Fairchild's." House Br. at 35. But Mr. Fairchild directly contradicts Bud Holmes' version of that phone call in the following important respects:

1. Mr. Fairchild does not remember Bud Holmes saying that he would pass Drew's case to the files. Nixon Ex. 41A, p. 29; Fairchild, Pt. 2, at 64, 80; Pt. 4B, Vol. I, at 180, 210.
2. Mr. Fairchild does not remember Judge Nixon saying that Drew Fairchild would not go to jail. Fairchild, Pt. 2, at 54, 64, 80.
3. Mr. Fairchild does not remember Judge Nixon saying that he was grateful for the opportunity to invest with Mr. Fairchild because of all the education expenses he had to carry with his children. Fairchild, Pt. 2, at 64; Pt. 4B, Vol. I, at 179, 210.

These direct contradictions of Bud Holmes' testimony disprove the House Managers' assertion that their witnesses somehow corroborate each other with "virtually identical" testimony.

3. Bud Holmes' Misconduct In February 1985

The House Managers never mention that in February 1985, Bud Holmes tried to suborn perjury by three witnesses.

Mr. Holmes had been subpoenaed to testify before the Hattiesburg Grand Jury for a third time. Nervous about the investigation, Mr. Holmes learned that Carroll Ingram had confirmed to the government that there had been a telephone call to Wiley Fairchild from Mr. Holmes' farm. Holmes, Pt. 2, at 136; Ingram, Pt. 2, at 170.

Mr. Holmes visited Mr. Ingram at his law office and told Mr. Ingram that he had "made me out to be a perjurer." Mr. Holmes questioned Mr. Ingram strongly about whether his memory was accurate and plainly attempted to persuade him to change his testimony. Indeed, Mr. Holmes visited Mr. Ingram on a second occasion a few days later to check whether he had changed his testimony. Holmes, Pt. 2, at 136-37; Ingram, Pt. 2, at 170-71. Mr. Ingram understood that Mr. Holmes was trying to get him to change his testimony, but he refused to do so. Ingram, Pt. 2, at 171.

Also before his February 1985 grand jury appearance, Mr. Holmes visited his former subordinate, Assistant District Attorney Katie Matison. In previous conversations, Mr. Holmes had attempted to get Ms. Matison to say that she had full responsibility for the Drew Fairchild case in the District Attorney's office. Matison, Pt. 4A, Vol. II, at 1351-53, 1358. On this occasion in February 1985, Mr. Holmes again told her that she had exercised full responsibility for the Drew Fairchild case and became "a little abusive and in a very fanatic way" said that Ms. Matison "was somehow an ingrate." Id. at 1357-58.

Having failed to disclose that their star witness attempted to secure perjured testimony from those two people in February 1985, the House Managers then adopt Mr. Holmes' totally implausible claim that when he then met with Judge Nixon, Judge Nixon falsely suggested to Mr. Holmes that the telephone call never occurred. House Br. at 52-53. Holmes' version of that conversation is contradicted by Judge Nixon, (Nixon, Pt. 2, at 242) and is thoroughly undermined by Mr. Holmes' attempt to suborn perjury from two other witnesses at the same time. Only one person was suborning perjury in Hattiesburg in February 1985, and that was the House Managers' star witness, Bud Holmes.

Indeed, Mr. Holmes' current testimony contradicts his own prior sworn statements. Mr. Holmes told the grand jury in February 1985 that Judge Nixon had confirmed that there was a telephone call to Wiley Fairchild from his farm. Nixon Ex. 46, pp. 53-54. Mr. Holmes admits that before his February grand jury appearance, Judge Nixon's lawyer told his attorney that Judge Nixon remembered the phone call, and would tell about it if asked. Holmes, Pt. 2, at 138-39; Pt. 4A, Vol. I, at 990. Now, however, Mr. Holmes says that was a lie designed to protect Judge Nixon. Holmes, Pt. 2, at 140. The House Managers swallow Mr. Holmes' implausible claim that this supposed lie was designed to protect Judge

Nixon, (House Br. at 53) even though Mr. Holmes grudgingly admitted under cross-examination that his February grand jury testimony did not actually protect Judge Nixon. Holmes, Pt. 2, at 140; Pt. 4B, Vol. I, at 320-21.

IV.

THE HOUSE MANAGERS' TWO KEY WITNESSES ARE NOT CREDIBLE

The House Managers' case depends entirely upon the testimony of Bud Holmes and Wiley Fairchild. Both witnesses have severe credibility problems that the Senate must confront directly. Mr. Fairchild and Mr. Holmes have contradicted themselves repeatedly, reversing themselves on critical issues.

There is a ready explanation for the testimonial backflips by both witnesses. Both were subjected to extraordinary pressures to come up with incriminating evidence about Judge Nixon, and virtually all of the evidence which the House Managers now trumpet was dredged up by Mr. Holmes and Mr. Fairchild in order to cement very favorable plea bargains. Testimony given to purchase favorable treatment by the government is always suspect, and those suspicions are amplified many times here. Once Mr. Holmes and Mr. Fairchild were locked into that testimony by the federal prosecutors, they had no escape from that false testimony. Even now, they can retreat to the truth only at the risk of being prosecuted for perjury.

These credibility considerations are particularly important because, as the Committee Report notes, the contradictory evidence in this case cannot be reconciled. Indeed, the Committee Report called the testimony "dramatically inconsistent" and referred to "extensive contradictory evidence" on the central events in the case. Committee Report at 18, 37. In these circumstances, the Senate must be especially attentive to credibility issues.

A. Wiley Fairchild: "Self-contradictory, Puzzling And Incredible!"

A successful businessman in his seventies, Mr. Fairchild says he has a very poor memory and an especially poor memory for dates. Fairchild, Pt. 2, at 48, 51, 67, 74, 86. He has explained that he relies upon others to supply that information for him. Post-Conviction 243; Fairchild, Pt. 2, at 75. Nevertheless, the federal prosecutors and now the House Managers have relied heavily upon Mr. Fairchild's testimony. He cannot be believed.

1. Did Mr. Fairchild Lie When He Said He Lied, Or When He Said He Told The Truth?

The most startling aspect of Mr. Fairchild's testimony is that he has stated under oath that he lied to the prosecutors, to the grand jury, and at Judge Nixon's trial. Yet, incredibly, Mr. Fairchild told the Senate Committee that he has always told the truth in this case. Fairchild, Pt. 2, 75.

Two days after Mr. Fairchild made his plea bargain in November 1984, he appeared for a second time before the Hattiesburg grand jury. On that occasion, Mr. Fairchild solemnly confessed to the grand jury that he had lied during his grand jury testimony in July, four months earlier. Nixon Ex. 41A, pp. 6-7. When Mr. Fairchild testified at Judge

Nixon's trial in February 1986, he also confessed that he had lied to the FBI when they interviewed him in April 1984. Fairchild, Pt. 4A, Vol. I, at 522.

At the post-conviction hearing in August 1988, Mr. Fairchild admitted at length that he intentionally gave false testimony at Judge Nixon's trial in February of 1986 in order to "please" the prosecutor. Post-Conviction 213, 216; see pp. 46-48, supra. Despite a long and aggressive cross-examination, Mr. Fairchild refused to abandon his confession that he had lied at Judge Nixon's trial: "Well, I've stated that everything that I testified to [at trial] wasn't the truth." Post-Conviction 241-42.

But when Mr. Fairchild appeared before the Senate Trial Committee last month, he had undergone yet another metamorphosis. Now Mr. Fairchild proclaims that he has always spoken the truth and has never lied intentionally. Fairchild, Pt. 2, at 75. He suggests that any mistakes in his prior testimony caused by confusion. Id. Whatever his motive, Mr. Fairchild plainly has lied under oath -- either when he testified falsely to "please" the prosecutor, or on the three occasions when he confessed to having lied, or when he told the Senate that he always has told the truth.

2. The Subjects Of Mr. Fairchild's Lies

The federal prosecutors exerted great efforts to change Mr. Fairchild's testimony on: (a) the date of the blackmail conversations and phone call; (b) who placed the phone call;

and (c) when Carroll Ingram first approached him concerning a possible investment by Judge Nixon. Mr. Fairchild was eager to change his testimony to please the prosecutors, and that manipulation was concealed from Judge Nixon during his criminal trial. This evidence further calls into question both Judge Nixon's conviction and this prosecution.

a. The Date Of The Blackmail Conversations And Phone Call

The central factual issue in Judge Nixon's trial was whether the phone call from Bud Holmes' farm occurred before Drew Fairchild's case was passed to the file, or afterwards. Prosecutor Weingarten "staked [his] case" on his claim that the phone call happened before Drew's case was passed to the files. In support of that claim, Prosecutor Weingarten pointed repeatedly to Wiley Fairchild's testimony. Nixon Ex. 62, pp. 1973-74. As we have explained (see pp. 45-48, supra), that testimony was contrary to Mr. Fairchild's initial recollection and was changed during plea bargaining to purchase favorable treatment. The prosecutor coached Mr. Fairchild to give that testimony, helping to prepare scripts to study in order to learn the new testimony. Nixon Ex. 37, 38, 39, 40, 41; Nixon Ex. 76, p. 3; Post-Conviction 433-35, 50-55. Indeed, in August of last year Mr. Fairchild admitted that he lied about this date to curry favor with the prosecutor, and that the blackmail conversations actually occurred after Drew's case was passed to the files.

b. Who Placed The Phone Call From Bud Holmes' Farm?

At the criminal trial, the prosecutor insisted that Judge Nixon's perjury was established because Judge Nixon had denied that he actually placed the telephone call from Bud Holmes' farm. Nixon Ex. 62, p. 1848. The prosecutor could make that argument only because Mr. Fairchild had changed his testimony.

Before he made his plea-bargain, Mr. Fairchild stated on at least three occasions that Bud Holmes placed the telephone call to him. Mr. Fairchild made that statement to his own attorney, Karl Kepper (Nixon Ex. 47, p. 10), to his assistant, John Baltar (Post-Conviction 31, 33), and to the FBI (Nixon Ex. 36). Those prior statements by Mr. Fairchild were concealed from Judge Nixon at his trial. But during his plea-bargaining, Prosecutor Weingarten told Mr. Fairchild that Judge Nixon must have placed the call (Post-Conviction 50) and Mr. Fairchild has given that testimony ever since.

c. When Did Carroll Ingram Speak To Mr. Fairchild About An Investment By Judge Nixon?

Mr. Fairchild told the FBI in April 1984 that Carroll Ingram first mentioned a possible investment by Judge Nixon in 1979, many months before the marijuana bust at the Hattiesburg Airport that implicated Drew Fairchild. Nixon Ex. 27. That testimony, however, did not fit the prosecutors' theory that the oil investment was connected to Drew's legal problems. Consequently, during plea negotiations prosecutor Weingarten told Mr. Fairchild that the approach by Mr. Ingram had to have happened after the airport bust in August 1980. Post-Conviction 37, 47-48, 212-13. Once more, Mr. Fairchild adopted the false testimony that the prosecutors fed him. He told the jury at Judge Nixon's trial that the approach from Carroll Ingram occurred after the August 1980 bust at the airport. Fairchild, Pt. 4A, Vol. I, at 493.

But before the House Subcommittee, at the post-conviction hearing, and before the Senate, Mr. Fairchild repudiated that lie. Mr. Fairchild now states that Mr. Ingram approached him in late 1979 or early 1980, long before the airport bust. Fairchild, Pt. 4B, Vol. I, at 217; Pt. 2, at 87; Post-Conviction 197.

3. Wiley's Motive To Lie: The Plea Bargain Deals

Mr. Fairchild clearly changed his testimony during his plea-bargaining. Like the good businessman that he is, Mr. Fairchild secured value in return, including:

(i) The prosecutor agreed to drop one of the two criminal charges against Mr. Fairchild, and to recommend that he receive no jail time at all, House Ex. 12;

(ii) The prosecutor agreed that he would drop all charges against Mr. Fairchild if he became convinced that there was no connection between the oil properties sold to Judge Nixon and Drew Fairchild's case. Fairchild, Pt. 4B, Vol. I, at 184, 187; Post-Conviction 190, 203-04, 45-46, 250-51.

(iii) The prosecutor agreed to help Mr. Fairchild retain his eligibility for contracts with the U.S. Department of Housing and Urban Development, despite his felony conviction. Post-Conviction 263-64, 400.

(iv) The prosecutor agreed to assist Mr. Fairchild's application for a presidential pardon. Fairchild, Pt. 4B, Vol. I, at 188, Weingarten, Pt. 4B, Vol. I, at 50; Post-Conviction 209-10, 70-72, 105-07, 378-80.

(v) The prosecutor agreed to do what he could to help Drew Fairchild with his legal problems, a promise that later was redeemed when the federal prosecutor took the Drew Fairchild case away from state prosecutors in order to ensure that Drew did not receive a long prison sentence in state court. Fairchild, Pt. 4B, Vol. I, at 188; Post-Conviction 202-03, 267-68.

Incredibly, the prosecutor argued to the jury that Wiley Fairchild's testimony had to be believed because "he had no reason to lie." Weingarten, Pt. 4A, Vol. II, at 1841, 1842, 1851, 1968. The prosecutor could make that argument because he had concealed most of his side-deals with Mr. Fairchild; now, however, we know better.

4. Not Worthy Of Belief

All of these factors, combined with Mr. Fairchild's demeanor when he testified, led the District Court last August to conclude that Mr. Fairchild cannot be believed (703 F. Supp. at 553):

> This Court finds Wiley Fairchild's testimony to be self-contradictory, puzzling and incredible! Whatever factors have combined to make him the rather pathetic figure he appeared to be on the witness stand is not for this Court to determine. Suffice it to say that, as a witness before this Court, his testimony was not worthy of belief.

B. Bud Holmes: "You Can Use Any One [Of My Answers] You Want"

The House Managers cannot win conviction unless the Senate concludes that Bud Holmes' testimony is true. We have pointed out the many points on which Mr. Holmes' version of events is squarely contradicted by other witnesses. See pp. 53-54, supra. But there are much deeper questions about Mr. Holmes than mere contradictions of his testimony, and those questions go to the core of his credibility.

1. Bud Holmes' List Of Shameful Acts

Every questionable action in this case was taken by Bud Holmes. This catalogue of shame reflects the attitudes of a witness who values neither truth nor integrity. His list of improper acts includes:

a. Indicting Drew Fairchild To Collect Bill Porter's Fee -- After Drew Fairchild's lawyer and Mr. Holmes' close friend Bill Porter negotiated a plea deal for Drew with the U.S. Attorney, Bill Porter complained that Drew had not paid his fee. For the express purpose of helping Mr. Porter collect his fee from Drew, Mr. Holmes took the case from the federal prosecutors and indicted Drew on state charges. Holmes, Pt. 2, at 94, 121; Pt. 4A, Vol. I, at 837-38; Nixon Ex. 55, p. 14. Mr. Holmes took over Drew's case even though state narcotics agents did not want him to do so, and initially refused to work with him. White-Spunner, Pt. 2, at 31; Nixon Ex. 29, p. 5; Holmes, Pt. 4B, Vol. I, at 238; Nixon Ex. 54, p. 1-2.

b. Not Indicting His Friend, Bob Royals -- When he indicted Drew Fairchild, Mr. Holmes chose not to indict Drew's partner, Robert Royals, despite extensive evidence that Mr. Royals was involved in drug smuggling with Drew. Mr. Royals was Mr. Holmes' pilot, and also was a client of Bill Porter, Mr. Holmes' close friend. Holmes, Pt. 2, at 117; Holmes, Pt. 4A, Vol. I, at 849; Matison, Pt. 4A, Vol. I, at 1337-38; Nixon Ex. 69; Nixon Ex. 32, p. 11; Nixon Ex. 46, p. 15. Holmes' failure to indict Bob Royals was the single event that most convinced Wiley

Fairchild that Holmes was trying to blackmail him. Fairchild, Pt. 2, at 56-57, 79-80.

c. Passing Drew's Case To The Files -- In December 1982, Mr. Holmes passed Drew Fairchild's case to the inactive files even though Drew already had pled guilty. House Ex. 17.

d. Lying On Matters Unrelated To Judge Nixon -- Mr. Holmes was indicted for lying to the Hattiesburg Grand Jury on each of the first three occasions he testified before it. House Ex. 23. Mr. Holmes has conceded that four of the five counts of his indictment accuse him of giving false testimony that had nothing to do with Judge Nixon. Holmes, Pt. 4B, Vol. I, at 321-22; Pt. 2, at 135-36.

e. Suborning Perjury -- As described above, in February 1985 Mr. Holmes pressed Carroll Ingram, Assistant District Attorney Katie Matison, and Judge Nixon to change their testimony to protect him. *See* pp. 54-57, *supra*.

2. Why Did He Pass Drew Fairchild's Case To The Files?

Mr. Holmes' cavalier attitude towards the truth is illustrated by his varying explanations for why he passed Drew Fairchild's case to the files in December 1982. The House Managers completely adopt Mr. Holmes' claim that he took that action because of his exchange with Judge Nixon, which he claims occurred in May 1982. On its face, this claim is totally implausible since seven months passed from May 1982 until Mr. Holmes took any action. In addition, Mr. Holmes repeatedly has admitted that he passed the case to the files in response to complaints by Bill Porter that the new Circuit Judge, Richard McKenzie, would not respect Drew's plea bargain. Holmes, Pt. 2, at 125-26; Pt. 4B, Vol. I, at 312; Pt. 4A, Vol. I, at 754-55; Nixon Ex. 46, p. 30; Nixon Ex. 55, p. 46; Nixon Ex. 54, p. 6.

On at least five occasions, Mr. Holmes has claimed either that he acted solely because of Bill Porter's complaint, or that Judge Nixon did not influence him. Those occasions include:

January 1983:	Television news interview (Nixon Ex. 73);
April 1984:	FBI interview (Nixon Ex. 29, pp. 6-7);
December 1985:	Sentencing memorandum prepared by his defense attorney (Holmes, Pt. 4B, Vol. I);
March 1987:	Civil deposition, under oath (Nixon Ex. 65);
March 1988:	Sworn written statement (Nixon Ex. 66).

When confronted with these statements, Mr. Holmes has repudiated every one of them. Mr. Holmes said he lied to the FBI in April 1984 (Holmes, Pt. 4B, Vol. I, at 316 (emphasis added)):

> Mr. Stewart. Were you lying to the FBI?
>
> Mr. Holmes. Sure.

Confronted with his contradictory deposition testimony, Mr. Holmes just shrugged: "It is just something that I answered that way. . . . It is just the way I answered it." Holmes, Pt. 4B, Vol. I, at 312 (emphasis added). And Mr. Holmes repudiated his sworn written statement even though it was based upon an interview at which he was represented by counsel, it had been read to him over the telephone for his approval, and it had been sent to him and his counsel for review to ensure that it was accurate, and he had read the statement before he signed it. Holmes, Pt. 4B, Vol. I, at 313-15.

a. What Is Going On Here?

In view of these contradictory pronouncements, it is necessary to step back and consider more objective facts. First, both Mr. Fairchild and Judge Nixon say that Mr. Holmes never mentioned passing the case to the files during the blackmail conversations. Fairchild, Pt. 2, at 59, 64; Pt. 4B, Vol. I, at 195; Nixon, Pt. 2, at 236-37, 291. Moreover, Mr. Holmes always has testified that after the phone call from the farm, he still did not want to pass the case to the files. Mr. Holmes testified that if Drew's co-defendant had been returned to Mississippi, Drew could have testified against him. Then Mr. Holmes would have brought Drew in for sentencing and never would have passed the case to the files. Holmes, Pt. 4B, Vol. I, at 308. Thus, even accepting Mr. Holmes' version of the "facts," Mr. Holmes did not intend to pass Drew's case to the files even after the phone call to Mr. Fairchild had occurred.

Only after Bill Porter complained in December of 1982 did Mr. Holmes decide to pass the case to the files. Mr. Holmes has agreed that in December 1982 there was no reason not to continue waiting for the return of Drew's co-defendant except that Bill Porter started agitating for resolution of Drew's case. Id. at 316.

Plainly, Bill Porter's intercession caused Drew's case to be passed to the file. Mr. Holmes' occasional testimony to the contrary, contradicted by his own statements and the objective evidence, cannot be credited.

3. Bud Holmes' Motive To Lie: His Plea Bargain

It is not difficult to find Bud Holmes' motive to feed the prosecution case against Judge Nixon. In late March 1985, Mr. Holmes and his attorney were advised by Prosecutor Weingarten that he was about to be indicted. Mr. Weingarten told them that Mr. Holmes did not have to be indicted if he could help the investigation. Mr. Holmes and his lawyer knew that the prosecutor wanted damaging testimony against Judge Nixon. Nixon Ex. 65; House Proceeding Ex. N-27; House 291, Trial 813-17. Mr. Holmes refused to deal and was indicted on March 29, 1985, on five counts of perjury and obstruction of justice.

During jury selection at his trial two months later, Mr. Holmes lost his nerve and began plea negotiations. House Ex. 42, p. 9 (Stipulation No. 85). Under the eventual plea deal, the government agreed to drop all of the felony charges against Mr. Holmes and instead to charge him only with the non-felony offense of contempt of court. House Ex. 24. Before Mr. Holmes was sentenced, Prosecutor Weingarten advised him that under the contempt of court allegation, Mr. Holmes could not be sentenced to both jail time and a fine. Surprisingly, though, the prosecutor stood mute as the sentencing judge imposed both sentences on Mr. Holmes; the sentencing judge's blunder, uncorrected by the friendly prosecutor, allowed Mr. Holmes to pay the $10,000 fine and thereby elude the jail term. Holmes, Pt. 2, at 108; Nixon, Pt. 2, at 307; Holmes, Pt. 4B, Vol. I, at 276-77, 324-25; Nixon Ex. 61.

The plea deal also gave the government the right to subject Mr. Holmes to polygraph examination. Despite the considerable questions concerning Mr. Holmes' veracity, the government never asked for a polygraph examination of Mr. Holmes concerning Drew Fairchild's case. Holmes, Pt. 4A, Vol. I, at 826-27. Evidently the government did not wish to create any further basis for questioning Mr. Holmes' truthfulness.

Like Wiley Fairchild, Bud Holmes got value from the government for his new testimony in this case. And also like Wiley Fairchild, Mr. Holmes gave value by changing his testimony to match the prosecutors' theory. In preparing for his own trial, Mr. Holmes had access to Wiley Fairchild's prior testimony so he knew what story he had to support.

Even though he had testified before the grand jury that the phone call happened in the spring of 1982 or 1983, after the plea bargain Mr. Holmes insisted that the date was May 14, 1982. See p. 48, supra. Mr. Holmes also had told the grand jury that Judge Nixon had confirmed that he remembered the phone call from the farm to Wiley Fairchild. After the plea bargain, however, Mr. Holmes reversed himself and claimed that Judge Nixon had denied that such a phone call happened. See p. 56, supra. These testimonial flipflops have served as the basis for both the criminal prosecution and this prosecution.

4. "You Can Use Any One [Of My Answers] You Want"

During Mr. Holmes' Senate testimony, a single sequence captured his total indifference to the truth. During his House testimony, Mr. Holmes was asked if he had intended to sweep Drew's case "under the rug" at the time of the phone call to Wiley Fairchild. Mr. Holmes responded that he "doubt[ed] seriously if I had any type thought process at that time about it." Holmes, Pt. 4B, Vol. I, at 248. But when the same question was repeated, Mr. Holmes gave the opposite answer: "Basically, sure, that was my thoughts at that time." Id. at 255.

The House Managers asked him the same question before the Senate Committee, and Mr. Holmes testified that he was not sure what he was thinking at the time of the phone call, but he did intend to sweep the case under the rug when he passed it to the files in December 1982. Holmes, Pt. 2, at 103.

At that point, Mr. Holmes had given all possible answers to the question: (i) "Yes," (ii) "No," and (iii) "I don't know." When he was then asked which of those three answers was correct, Mr. Holmes replied coolly, "You can use any one you want." Id. at 144.

The Senate cannot convict Walter Nixon on the testimony of such a witness.

V.

THE HOUSE HAS FAILED TO PROVE ITS CASE

As fully demonstrated above, the House Managers have failed to prove that Judge Nixon's statements were made with any intent to mislead or deceive. See pp. 18-37, supra. This section explains that the House Managers also failed to meet their burden on the remaining two elements of this allegation: materiality and actual falsity.

A. Judge Nixon Must Be Acquitted On Article I

Article I charges that when Judge Nixon testified before the grand jury on July 18, 1984, he made a material false statement when he denied that Bud Holmes "had ever discussed the Drew Fairchild case" with him.

1. No Inaccuracies Have Been Proved To Have Been Material

Article I charges that Judge Nixon made "material" false and misleading statements. The Article thus expressly recognizes that the House Managers must show not only that Judge Nixon misleadingly concealed information from the prosecutors, but also that that information would somehow have made a difference to the outcome of the investigation. That element cannot be established.

The chief House witnesses themselves both testified that the blackmail conversations were of no real importance. Fairchild, Pt. 2, at 69-70; Holmes, Pt. 2, at 107, 114, 116. Wiley Fairchild did not ask Judge Nixon to do anything with respect to the Drew Fairchild case, (Fairchild, Pt. 2, at 63; Pt. 4A, Vol. I, at 640-41; Pt. 4B, Vol. I, at 209) and indeed conceded that he had not discussed the case with Judge Nixon. Fairchild, Pt. 2, at 68-69; Pt. 4B, Vol. I, at 195; Nixon Ex. 30, p. 70. Judge Nixon, in turn, did not ask Bud Holmes to do anything about the case, (Nixon, Pt. 2, at 314-15) and told Bud Holmes he did not want to discuss the case. Holmes, Pt. 2, at 99, 113, 145, 151; Nixon, Pt. 2, at 235, 253, 282, 312. As all the fact witnesses agree, along with Prof. Hazard, the draftsmen of the Model Code of Judicial Conduct, there was absolutely nothing wrong about Judge Nixon's participation in the blackmail conversations, (Holmes, Pt. 2, at 133, 140; Ingram, Pt. 2, at 1278, 181-82; Nixon Ex. 68A).

Not surprisingly, when the prosecutors learned of the blackmail conversations, they brought no criminal charges based on those conversations, and no such charges appear in the Articles of Impeachment. In short, no criminal conduct was revealed that was material to the investigation. Judge Nixon's alleged concealment of information thus obstructed no investigation and was not truly material. As Senator Reid observed in the Senate hearings: "You [Judge Nixon] are being charged, you have been convicted, and you have served time in prison for lying about something that had no bearing on anything." Nixon, Pt. 2, at 291; see also Beer, Pt. 2, at 218.

2. Judge Nixon's Testimony Was Literally True: Bud Holmes Did Not Discuss Drew Fairchild's Case With Him

The literal truthfulness standard is applied to cases like this one because human beings communicate imperfectly. Many times a speaker will use a term that has more than one possible meaning and those responding may understand the term in a variety of ways. Thus, depending upon the understanding of the listener, his response may be portrayed as either accurate or inaccurate.

Because of imperfect communication, literal truthfulness always must be a defense to a prosecution for making false statements. If a speaker's statements plausibly may be interpreted as truthful, there can be no conclusion that the statement was false, even if a different statement might seem "more true," or more responsive to the question. Accordingly, if Judge Nixon's statements are truthful under a plausible interpretation of the questioning or his answers, then he must be acquitted.

The courts often have reversed convictions for perjury because the challenged testimony might be deemed false under one construction of the words, but might be deemed true under an alternative view.[11] The Senate also must consider the highly charged atmosphere in which the questioning was conducted. As the Supreme Court has cautioned:

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[11] See e.g., United States v. Tonelli, 588 F.2d 194 (3d Cir. 1978), ("handled" is ambiguous); United States v. Cowley, 720 F.2d 1037, 1043 (9th Cir. 1983) ("had" is ambiguous), cert. denied sub nom. St. Clair v. United States, 465 U.S. 1029 (1984); United States v. Finucan, 708 F.2d 838 (1st Cir. 1983) ("stuff" is ambiguous); People v. Blumenthal, 55 A.D.2d 13, 389 N.Y.S.2d 579 (1976) ("vouch"); State v.

> Under the pressures and tensions of interrogation, it is not uncommon for the most earnest witnesses to give answers that are not entirely responsive. Sometimes the witness does not understand the question, or may in an excess of caution or apprehension read too much or too little into it.

Bronston v. United States, 409 U.S. 352, 358 (1973).

For a number of reasons, Judge Nixon's statement in Article I plainly was true: (a) Judge Nixon reasonably remembered the blackmail conversations as concerning blackmail of Wiley Fairchild, not Drew's case; (b) there is no proof that Bud Holmes ever "discussed" Drew's case with Judge Nixon; and (c) Judge Nixon reasonably thought the question concerned how Drew's case was transferred from federal prosecutors to Bud Holmes.

a. Judge Nixon Remembered Blackmail Conversations, Not Conversations About Drew's Case

Because he remembered his conversation with Bud Holmes as relating to blackmail, Judge Nixon truthfully denied that Mr. Holmes discussed Drew's case with him.

Cousins, 4 Ariz. App. 318, 420 P.2d 185 (1966) ("run"); and United States v. Razzaia, 370 F.Supp. 577 (D. Conn. 1973) ("notebook"); United States v. Chapin, 515 F.2d 1274, 1280 (D.C. Cir.), cert. denied, 423 U.S. 1015 (1975); United States v. Bell, 623 F.2d 1132, 1136 (5th Cir. 1980); United States v. Williams, 552 F.2d 226, 229 (8th Cir. 1977); People v. Hoag, 89 Mich. App. 611, 281 N.W. 2d 137, 140-41 (1979); State v. Douglas, 217 Neb. 199, 218, 349 N.W. 2d 870, 882 (1984).

(1) The Blackmail Allegations Were Not The Same As Drew's Case

The subject of Wiley Fairchild's complaint to Judge Nixon was blackmail, not Drew's case. Mr. Fairchild has testified unequivocally that he told Judge Nixon about the blackmail problem because he wanted to stop the pressure on himself, not in order to help Drew. Fairchild, Pt. 2, at 69; Pt. 4B, Vol. I, at 208. Indeed, he has insisted that he was not interested in helping Drew, did not ask Judge Nixon to put in a good word for Drew, and was not trying to get special treatment for Drew, or a lighter sentence, or no sentence. Fairchild, Pt. 2, at 60, 63, 79, 86; Pt. 4A, Vol. I, at 640-41; Pt. 4B, Vol. I, at 208. Judge Nixon always has testified that Wiley Fairchild related his blackmail suspicions to him, and that he passed that message on to Bud Holmes. Nixon, Pt. 2, at 232-33, 250-52; Pt. 4A, Vol. II, at 1533-36; Pt. 4B, Vol. I, at 434.

There is no basis for crediting Mr. Holmes' unsupported testimony that Judge Nixon did not mention the blackmail issue to him. Wiley Fairchild indisputably complained to Judge Nixon that Mr. Holmes was blackmailing him. Why would Judge Nixon tell Mr. Holmes any message other than the message Judge Nixon had been given? It only makes sense that Judge Nixon told Mr. Holmes about the complaint Mr. Fairchild actually made.

At least three other witnesses, two of whom were called by the House Managers, squarely support Judge Nixon on this point. Wiley Fairchild himself clearly distinguished between the blackmail issue and Drew's drug prosecution (Fairchild, Pt. 2, at 69):

> Mr. STEWART. Do you recall being asked these questions before the grand jury in July? ["]Did you ever discuss Drew's case with Judge Nixon?["] And you answered, "No, I don't recall ever discussing it with Judge Nixon"?
>
> Mr. FAIRCHILD. That's right.
>
> Mr. STEWART. OK. And was that true testimony?
>
> Mr. FAIRCHILD. Yes.
>
> Mr. STEWART. OK. Then in the House you were asked these questions at page 195. ["]You also testified yesterday you never did discuss with Judge Nixon possibly whether Drew's case could be passed to the files. That that never came up.["] Your answer was no.
>
> Question was, "Is that correct?" And then you said, "No, I never did discuss Drew's case with Judge Nixon." Was that accurate testimony at the time?
>
> Mr. FAIRCHILD. Well, as I said a while ago, I talked to him about this blackmail thing.
>
> Mr. STEWART. OK.
>
> Mr. FAIRCHILD. To that extent, and that is the only.
>
> Mr. STEWART. Right. But you were drawing a distinction there between the blackmail suspicion and talking about Drew's case, trying to get something for Drew, isn't that right?
>
> Mr. FAIRCHILD. Yes.

> Mr. STEWART. Because when you talked to him about the blackmail, you really weren't trying to get anything for Drew. You were trying to get Bud Holmes off your back, weren't you?
>
> Mr. FAIRCHILD. Yes.

Even FBI Agent White-Spunner agreed with Sen. Mack that Judge Nixon may have not described the blackmail conversations because "he never recalled that issue about blackmail and was, in fact, focusing on just your questions or Mr. Weingarten's questions." White-Spunner, Pt. 2, at 45.

Finally, Rodney Fairchild, Wiley's brother and business partner, has stated under oath that on the morning after Wiley spoke with Judge Nixon, "Wiley told me that he had had a conversation with Judge Nixon and had told Judge Nixon that he thought he was being blackmailed concerning Drew's case." Nixon Ex. 77. Again, the principal subject of the conversation as described by Wiley, and as recalled by Rodney, was blackmail.

(2) For Some Reason, Judge Nixon Was Never Asked About Blackmail Allegations

The investigators never asked Judge Nixon about Mr. Fairchild's blackmail allegations during the April interview or the July grand jury testimony. This oversight is difficult to explain for several reasons. First, Wiley Fairchild clearly was convinced that he was being blackmailed. Nine days before Judge Nixon was interviewed by the FBI, Mr. Fairchild told the FBI that he was being blackmailed. Nixon Ex. 22. One day before Judge Nixon was interviewed, Mr. Fairchild repeated that charge several times in a conversation that the FBI secretly tape-recorded. Nixon Ex. 25. FBI Agent White-Spunner agreed that Wiley Fairchild had "blackmail on the brain." White-Spunner, Pt. 2, at 36. Yet the investigators never asked Judge Nixon about blackmail.

When Carroll Ingram testified before the grand jury the day after Judge Nixon, he was asked several questions about possible blackmailing of Wiley Fairchild. Ingram, Pt. 2, at 175; Nixon Ex. 31, pp. 64-66. No such questions were asked of Judge Nixon. Under questioning by Sen. Mack, Agent White-Spunner could not come up with an explanation for that failure by the investigators. White-Spunner, Pt. 2, at 45. Because of that failure, Judge Nixon reasonably did not think of the blackmail conversations during the questioning.

b. Judge Nixon And Bud Holmes Had No Discussion About Drew Fairchild's Case

According to both Judge Nixon and Bud Holmes, when Mr. Holmes offered to tell Judge Nixon about Drew's case, Judge Nixon stopped him and said he did not want to hear about it. Holmes, Pt. 2, at 99, 113, 145, 151; Nixon, Pt. 2, at 235, 253, 282, 312; Holmes, Pt. 4B, Vol. I, at 247; Nixon, Pt. 4B, Vol. I, at 437. This critical fact raises an important question: If Judge Nixon stopped Bud Holmes from telling him about Drew's case, then why can't Judge Nixon deny that Mr. Holmes discussed the case with him? Indeed, would it be false for Judge Nixon to claim to have had such a discussion when he prevented it from occurring?[12]

This point is highlighted by the context in which the question arose during the April interview of Judge Nixon. Judge Nixon was asked if Bud Holmes ever discussed his cases with Judge Nixon. The judge replied, "I think a few murder cases we discussed." House Ex. 1, p. 28. On those occasions, Mr. Holmes would "tell me about what happened in the case, and could tell me about the happening, of the evidence that they found, the witnesses, and what happened, and how they were disposed of, and what have you." Nixon, Pt. 4B, Vol. I, at 444. That is far different from the exchange involved in this case.

That the term "discuss" entails a full review of a subject is established by the dictionary definition (Webster's Ninth New Collegiate Dictionary, p. 362): "a: to investigate by reasoning or argument b: to present in detail for examination or consideration." Will Denton, president of the Mississippi Trial Lawyers Association, pointed out some of the overtones in a question whether a case was "discussed" (Denton, Pt. 2, at 211): "I'm not sure how it works in Washington or in other parts of the country, but in the deep south if you were asked if you discussed a case, that would carry some pretty heavy meaning, like: Did you try to influence the outcome?" The ambiguities of a term like "discuss" were explored in an illuminating exchange between Sen. Danforth and Carroll Ingram (Ingram, Pt. 2, at 182-83) (emphasis added):

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[12] When Judge Peter Beer was asked a similar question, he replied that it would be more accurate in these circumstances to answer that the matter had not been discussed. Beer, Pt. 2, at 220.

> The VICE CHAIRMAN. [Y]ou were asked the question, did you talk to Mr. Holmes during this period of time. And you said, "I didn't talk to him as a lawyer."
>
> Mr. INGRAM. That's correct.
>
> The VICE CHAIRMAN. It is very curious. I mean, you were asked did you talk to Mr. Holmes, and you had a little bit of difficulty in exactly how you were going to frame that answer.
>
> Mr. INGRAM. Well, how I would frame that answer is that I wanted it to be clear that I did not represent Drew Fairchild in any sense of the word. . . .
>
> * * * *
>
> The VICE CHAIRMAN. Well, when you were asked in a setting such as this, with a transcript being taken, "Did you talk to Mr. Holmes?" your answer as I understand it depends on what do you mean by "talk."
>
> Mr. INGRAM. Yes, that's correct.
>
> The VICE CHAIRMAN. In your appearance before the grand jury, were you asked whether or not you discussed at any time the Drew Fairchild case with Judge Nixon?
>
> Mr. INGRAM. Yes.
>
> The VICE CHAIRMAN. What was your answer?
>
> Mr. INGRAM. No, I did not discuss it -- and I didn't.

> The VICE CHAIRMAN. And your testimony of your telephone call today before this committee of your telephone call with Judge Nixon, in your lawyer's mind, then, is not a discussion?
>
> Mr. INGRAM. No, sir, not only in my lawyer's mind, but in my mind it was not a discussion, because I didn't ask him anything about that information he relayed to me, we did not have a discussion about it; it was an implied --
>
> The VICE CHAIRMAN. And you assumed that the grand jury, which you know is empaneled of citizens and not lawyers, when asked before a grand jury, under oath, "Have you ever discussed the Drew Fairchild case with Judge Nixon?" having had a telephone conversation with him, you told the grand jury, no, you never discussed the case.
>
> Mr. INGRAM. That's right.
>
> The VICE CHAIRMAN. And you believe in your mind that that's true.
>
> Mr. INGRAM. I certainly do, yes, sir.

3. Judge Nixon Truthfully Denied Any Discussion About The Federal Handling Of Drew's Case

Even if the brief exchange between Judge Nixon and Bud Holmes is deemed a "discussion" of Drew's case, it was not a discussion of the federal handling of the case or how the case was transferred from federal to state prosecutors. There is no testimony suggesting that the blackmail conversations included any mention of federal involvement. Yet virtually all of the questioning during the interview and the grand jury testimony focused on the federal handling of Drew Fairchild's case and how the case went from federal to state hands. With his understanding of the questions framed by the investigators themselves, Judge Nixon accurately answered that Bud Holmes had not discussed Drew Fairchild's case with him.

a. The Early Investigation: How Did Drew Fairchild's Case Get Into Bud Holmes' Hands?

The investigation was prompted by a totally unfounded, anonymous allegation that Mr. Fairchild paid off Judge Nixon to shut down Drew's case on the federal level. Nixon Ex. 18, p. 16; White-Spunner, Pt. 2, at 28. Agent White-Spunner confirmed that the initial allegation was that Judge Nixon had steered Drew's case away from federal prosecutors and into Bud Holmes' hands. Id. at 30.

In the early investigation, the FBI was trying to answer questions such as how did the federal prosecution get shut down, and how did Mr. Holmes get the Drew Fairchild case? White-Spunner, Pt. 2, at 30; Nixon Ex. 21, pp. 28-29. In fact, when the FBI conducted its first formal interview, the agents told Wiley Fairchild that one of the "crucial questions" they were investigating was how Drew's case was transferred from federal hands to Holmes. Nixon Ex. 22; White-Spunner, Pt. 2, at 33.

b. The April Interview: How Did The Case Get Transferred To Bud Holmes?

Before the tape recorder was turned on during the April interview, the investigators told Judge Nixon that they were investigating the oil properties he bought from Wiley

Fairchild and the handling of Drew's case at the federal level. Nixon, Pt. 2, at 239, 260-61. Judge Nixon had not known until that moment that Drew's case ever had been in federal hands and, as a federal official, he was very interested in that information. Id. at 239. Indeed, Judge Nixon did not think the succeeding questions even related to the state's handling of Drew's case. Id. at 262.

During the tape-recorded portion of the interview, the investigators told Judge Nixon that the transfer of Drew's case to Bud Holmes was "what we're looking at here." House Ex. 1, pp. 28-29, 32, 42-46 (emphasis added). Judge Nixon expressed his ignorance of that transfer, and expressed great interest in it. Id., pp. 28, 32, 43-44. See White-Spunner, Pt. 2, at 39-40.

c. The July Grand Jury Testimony: Testifying About The Transfer From Federal To State Hands

From Judge Nixon's grand jury testimony, it is clear that when he denied that Bud Holmes discussed Drew's case with him, he had in mind the question of how Drew's case was passed from federal to state hands -- the question which the investigators had planted in his mind. After answering that Mr. Holmes had not discussed Drew's case with him, Judge Nixon immediately explained that the federal government could not interfere with a state prosecution, reflecting the judge's understanding that the investigation concerned federal actions that might be attributed to a federal official like himself. House Ex. 2, pp. 48-49; Nixon, Pt. 2, at 296; Pt. 4B, Vol. I, at 467-69. Judge Nixon then returned to that subject at length in order "to explain my answer" concerning "the authority of a federal judge." House Ex. 2, pp. 51-52.

Judge Nixon's focus on the federal handling of Drew's case was based on his understanding that he could be accused of misconduct only for interfering with a federal matter. Nixon, Pt. 2, at 290-91. At the close of his grand jury testimony, Judge Nixon observed to the grand jurors that the only "possible charge" of a federal crime that he knew about would concern the Drew Fairchild case, and that since he had no involvement with that matter while it was at the federal level, "I had nothing to do with that." House Ex. 2, p. 96; Nixon, Pt. 4B, Vol. I, at 452-53.

All of these statements reflect Judge Nixon's understanding that the questioning concerned the transfer of the case. That understanding was reasonable and plausible under the circumstances, and Judge Nixon truthfully denied such a discussion.

B. The House Managers Have Not Proved Article II

As we pointed out earlier, Article II was rewritten by the House and readopted earlier this month in a manner which totally changed its meaning: instead of charging that Judge Nixon falsely denied speaking to anyone to influence the Drew Fairchild case (the old allegation), the amended Article II charges that he falsely denied that he actually influenced the case. The change in meaning is unmistakable.

Also Article II unfairly condenses a statement that covered 24 lines of transcript into excerpts covering only six lines of text. Judge Nixon's full testimony at this point was (House Ex. 2, pp. 76-77):

> And I want to say this. That I've been told and led to believe and read in the newspaper and heard on the news media so much about this is an investigation of the Drew Fairchild criminal case. Now, I have had nothing whatsoever officially or unofficially to do with the Drew Fairchild criminal case in federal court or state court. I don't need to reconstruct anything with reference to that. I've told you that from the beginning.
>
> I have never talked to anyone about the case, any federal judge or state judge, federal prosecutor or state prosecutor, and I never handled any aspect of this case in federal court. As you said, Judge Cox handled it. I don't know where -- someone told me maybe Judge Russell handled one of the other defendants also and -- but I never handled any part of it, never had a thing to do with it at all, and never talked to anyone, state or federal, prosecutor or judge, in any way [to] influence anybody with respect to this case.

For all of the reasons explained above with respect to Article I, the House Mangers have not proved (i) that Judge Nixon intentionally spoke falsely, or (ii) that the supposedly false statement was material. (See, pp. 74-87, supra). For Article II, however, we also explain the literal truthfulness of Judge Nixon's testimony.

1. Judge Nixon Truthfully Denied Having Anything To Do With Drew's Case "In Federal Court Or State Court"

The first fragment of testimony identified by Article II is Judge Nixon's statement is that he had nothing to do with Drew Fairchild's case "in federal court or state court." First, Judge Nixon reasonably and accurately could make that statement because he understood his conversations with Wiley Fairchild and Bud Holmes to have concerned blackmail allegations, not Drew's case. See pp. 77-81, supra. He sought no advantage for Drew Fairchild, and was not asked by Wiley Fairchild to do so, and thus truly had nothing to do with the case. Fairchild, Pt. 2, at 60, 63, 79, 86; Pt. 4A, Vol. I, at 640-41; Pt. 4B, Vol. I, at 208; Nixon, Pt. 2, at 249, 251; Pt. 4B, Vol. I, at 434.

Second, it is undisputed that Judge Nixon did not seek any change in the disposition of Drew's case. After the blackmail conversations were completed, Judge Nixon knew only that the pre-existing plea agreement between Drew and Bud Holmes would be respected. Surely when a witness is told only that certain pre-existing arrangements will be carried out, he may truthfully state later that he had nothing to do with the matter. Before the blackmail conversations, Drew had a plea deal with Bud Holmes; after the blackmail conversations, Judge Nixon reasonably understood that Drew still had the same deal. Nothing happened, and Judge Nixon truthfully denied having anything to do with Drew's case.

Third, Judge Nixon's denial is confined to doing something with the case in any court. There is no testimony suggesting that he had any involvement in Drew's case in any court. No witness suggests that he attempted to influence any deliberation by any court or the presentation of any issue in any court. Consequently, his statement that he had nothing to do with the case "in" court was entirely true.

2. Judge Nixon Truthfully Denied "Handling" Drew's Case Or Having "A Thing To Do With It At All"

Article II completely distorts Judge Nixon's testimony that he "never handled any part of it [Drew's case], never had a thing to do with it at all." Judge Nixon's actual testimony was (House Ex. 2, p. 76) (emphasis added):

> I never handled any aspect of this case in federal court. As you said, Judge Cox handled it. I don't know where -- someone told me maybe Judge Russell handled one of the other defendants also and -- but I never handled any part of it, never had a thing to do with it at all. . .

When Judge Nixon's statements are returned to their context, it is clear that he was explaining to the grand jury that Judge Cox may have handled Drew's case "in federal court"; or that perhaps Judge Russell handled some of the defendants in federal court; but that Judge Nixon had never "handled any part of it, never had a thing to do with it at all" in federal court. His statements constituted a denial that he had "handled" Drew's case in the sense of presiding over it in court, and those statements were incontestably true.

3. Judge Nixon Truthfully Stated That He Never Influenced Drew's Case In Any Way

The remaining issue in Article II is Judge Nixon's statement that he did not speak to anyone, "State or Federal, prosecutor or judge, that in any way influenced anybody" with respect to the Drew Fairchild case. The statement was true.

There is no evidence that Judge Nixon had any reason to believe he had influenced Drew's case. Judge Nixon recalls that Mr. Fairchild told him about the blackmail suspicions, he passed those suspicions on to Bud Holmes, and Mr. Holmes evidently convinced Mr. Fairchild on the telephone that there was no basis for those suspicions. Nixon, Pt. 2, at 236-37, 252. These conclusions were shared by Mr. Fairchild, who testified that after the telephone call from Mr. Holmes' farm, he thought the blackmail problem had been resolved and Bud Holmes would honor Drew's pre-existing plea agreement. Fairchild, Pt. 2, at 64; Pt. 4B, Vol. I, at 180, 210. Based on those recollections, Judge Nixon spoke with complete accuracy when he told the grand jury that he had not in any way influenced Drew's case.

Even Bud Holmes' improbable version of events establishes the truthfulness of Judge Nixon's statement. According to Mr. Holmes, when he told Judge Nixon that Drew had a plea agreement, Judge Nixon asked whether Wiley

Fairchild knew about the plea agreement. Holmes, Pt. 2, at 99, 113; Pt. 4B, Vol. I, at 246. Mr. Holmes said either he or Judge Nixon suggested calling Wiley Fairchild to tell him about the plea agreement, which they did. Holmes, Pt. 2, at 114. The purpose of the phone call to Mr. Fairchild, according to Mr. Holmes, was to inform Mr. Fairchild about Drew's preexisting plea bargain. Holmes, Pt. 2, at 101, 114; Pt. 4A, Vol. I, at 739. Although Mr. Holmes claims that he volunteered to Wiley Fairchild that he could pass Drew's case to the files, Mr. Holmes has no idea whether Judge Nixon overheard that supposed statement. Holmes, Pt. 2, at 115.

On these "facts" as described by Bud Holmes, Judge Nixon left Bud Holmes' farm knowing only that they had told Wiley Fairchild about Drew's preexisting plea agreement. Even under Mr. Holmes' version, Judge Nixon truthfully testified that he had not influenced Drew's case.

C. Impeachment Article III: The Unfairest Article Of Them All

Article III is thoroughly objectionable. It carries to extremes the House Managers' strategy of tearing Judge Nixon's statements out of context, dividing them into unrecognizable bits and charging mere sentence fragments as alleged false statements. In the most notable example of this strategy, the House Managers have taken the statement charged in Impeachment Article II, which already is grievously distorted and presented out of context, and have

subdivided it into four alleged false statements. Moreover, by including fourteen alleged false statements in Article III, the House Managers assume the burden of proving that all fourteen statements are false as alleged; if any one of them is true, the Senate cannot convict Judge Nixon.

Again, the House Managers have not proved that Judge Nixon's statements betray any intent to mislead, or that the information supposedly withheld was material. See pp. 74-87, supra. In addition, when the alleged false statements are examined in context, they plainly are true.

1. Article III(1): April 1984 Interview Statements

Article III(1) charges that seven statements by Judge Nixon during the April 1984 were intentionally false. We note at the outset that Judge Nixon never was charged by the grand jury with making any false statements during the April interview. This conspicuous lack of prosecution reflects a critical fact: Judge Nixon spoke during the interview without any notice of the subjects or purposes of the interview, as both the prosecutor and FBI Agent White-Spunner admitted. House Ex. 1, p. 41; White-Spunner, Pt. 2, at 40. In those circumstances, there is even less basis for concluding that Judge Nixon intentionally spoke falsely.

In any event, even if there were a basis for finding that Judge Nixon intended to lie, the specific allegations in Article III(1) fail to identify any false statements.

Article III(1)(A) -- This allegation is a tricky one. At his criminal trial, Judge Nixon was charged in Count II of the indictment with having falsely denied before the grand jury that Wiley Fairchild had discussed Drew's case with him. House Ex. 28. He was acquitted on that charge. House Ex. 29. Apparently not wishing to challenge the jury verdict, the House Managers present no charge based upon Judge Nixon's grand jury testimony on this factual point. But Article III(1)(A) alleges that the identical statement, when made during the interview, was both false and an impeachable offense.

The Senate should not reward such subtle and devious tactics. Wiley Fairchild repeatedly has testified that he did not talk about his son's case with Judge Nixon, but rather related his suspicions of blackmail. Mr. Fairchild explained to the Senate Committee that he distinguished between the blackmail allegations and Drew's case, see pp. 78-80, supra, as did Judge Nixon. In that context, no evidence supports the allegation that Judge Nixon's statement was false, as the jury concluded.

Article III(1)(B) -- This allegation duplicates the allegation in Article III(1)(A) and should be rejected for precisely the same reasons.

Article III(1)(C) -- It is hard to believe that the innocuous statement charged here could be exalted into a supposedly impeachable offense. At the time of the April interview, Judge Nixon recalled reading the newspaper stories about Drew Fairchild and also learned more about the case from the interviewers. Those two sources provided him with all of the information he could think of at that time, as he told the prosecutors. The insignificance and truthfulness of the remark is patent.

Moreover, according to the testimony of Judge Nixon, Mr. Fairchild and Mr. Holmes, Judge Nixon acquired no knowledge about the Drew Fairchild case during the blackmail conversations that was not also reported in the newspaper articles in January 1983. Nixon Ex. 15, 16. Both the blackmail conversations and the newspaper articles disclosed that Drew had been charged with a drug offense, pled guilty, and had an agreement with the prosecutor. Accordingly, Judge Nixon truthfully stated that he had "no knowledge" about the case other than what he read in the newspaper and learned from the questioners. In any event, he reasonably did not think of the blackmail conversations at that time, because he had not remembered them in terms of Drew's case.

Article III(1)(D) -- Wrenched entirely out of context, this charge is wholly nonsensical: that Judge Nixon falsely said "Nothing was ever done or nothing was even mentioned about Wiley Fairchild's son." In context, Judge Nixon denied the baseless allegations of bribery in connection with Drew's case. Just before Judge Nixon made the imprecise statement alleged to be false, the prosecutor had asked about the date of his purchase of oil properties, and whether there had been anything asked of him in connection with that purchase. The prosecutor told Judge Nixon that he was a "savvy guy" and knew that judges can be "victimized by others." Id. at 36.

Judge Nixon responded, "Well, I don't know about that part of it, but all I know is ah nothing was done or nothing was ever mentioned about WILEY FAIRCHILD's son, and I defy anybody to . . . show any connection or anything I've ever done in connection with WILEY FAIRCHILD's son's case I certainly would (unintelligible) to begin with. And if I even suspected something like that was going on, I certainly wouldn't have ah invested or have any dealings, absolutely." Id. at 37.

Judge Nixon plainly stated that his purchase of oil properties had no connection to Drew's case, which indisputably was true. In any event, Judge Nixon truthfully stated that he had done nothing about Drew: his exchanges with Wiley and Holmes related not to Drew, but to Wiley's claim of blackmail.

Article III(1)(E) -- This allegation duplicates the allegations in Article III(1)(C) concerning how Judge Nixon knew about Drew Fairchild's case, and in Article II, concerning what he had to do with Drew's case. For the reasons recited in our response to those Articles above, Article III(1)(E) should be rejected.

Article III(1)(F) -- Judge Nixon took no action that was designed or intended to influence the Drew Fairchild case. He passed on Wiley Fairchild's blackmail complaint to Bud Holmes, and thought that matter had been resolved. According to Mr. Holmes, Judge Nixon did not ask him to do anything on Drew's case, and Judge Nixon insisted that he did not want Mr. Holmes to do anything about Drew's case. Holmes, Pt. 2, at 97, 99, 113, 114, 144, 146, 157. Judge Nixon truthfully stated that he had done nothing to influence Drew's case.

Article III(1)(G) -- The House Managers admit that this allegation duplicates Impeachment Article I. Accordingly, we rely upon our response to Article I. See pp. 74-87, supra.

2. Article III(2): The Grand Jury Testimony, Again

Article III(2) alleges seven false statements by Judge Nixon before the grand jury, five of which are already charged in Articles I and II.

Article III(2)(A) -- This charge "triplicates" the allegations in Articles I and III(1)(G). We rely upon our response to Article I. See pp. 74-87, supra.

Article III(2)(B) -- This charge omits a crucial qualification from its paraphrase of Judge Nixon's remarks. What Judge Nixon actually said was:

> I don't know of any reason I would have met with him after the transaction was finalized in the first part of 1981, but I can't say for sure. It's possible. You're asking me about -- I -- I don't like to keep repeating it -- but three or

> four years ago, and I'm trying to reconstruct this to the best of my recollection and knowledge.

House Ex. 2, p. 56. Judge Nixon was thus anything but assured in this testimony. Moreover, the questioning preceding these remarks related to meetings between Judge Nixon and Wiley concerning the judge's purchase of oil interests, and the prosecutor clearly was probing any connection between that transaction and the Drew Fairchild case. Judge Nixon knew there was no such connection and accurately and cautiously stated he was not sure of any other "reason" he might have met with Wiley thereafter.

Article III(2)(C) -- This charge once again critically transforms Judge Nixon's actual testimony, which was:

> I came here voluntarily and am very happy to cooperate with this grand jury and give them all the information that I have and that I could. . . . I have nothing at all to -- had nothing to hide or nothing to withhold and I brought everything that you have asked me to bring.

House Ex. 2, pp. 75-76. Contrary to the House's allegation, Judge Nixon did not say that he had given the grand jury all the information he had, but rather stated his willingness to do so. Judge Nixon said that he was happy to cooperate and to give the grand jury all the information he could. To convict on this charge, the Senate would have to conclude that Judge Nixon was not happy to give the grand jury all the

information he could even though he volunteered to be the first witness before the grand jury. In any event, even if Judge Nixon actually had made the statement attributed to him by the House Managers, that statement would have been entirely truthful in view of the judge's reasonable belief that he had responded to the apparent thrust of the prosecutor's questioning.

Article III(2)(D) -- The charge does not accurately state Judge Nixon's actual testimony. He said (with the omitted passages underlined) (House Ex. 2, p. 76):

> Now, I have had nothing whatsoever officially or unofficially to do with the Drew Fairchild criminal case in federal court or state court.

But even this correction removes the statement from its full context, as explained in our response to Article II, and we rely upon that response to answer this allegation. See pp. 87-92, supra.

Article III(2)(E) -- Again, the charge garbles Judge Nixon's actual testimony. Judge Nixon told the grand jury (with the omitted passages underlined, and imagined passages in brackets) (House Ex. 2, p. 76):

> I have never talked to anyone about the case, [including] any federal judge or state judge, federal prosecutor or [the] state prosecutor, and I never handled any aspect of this case in federal court [about the Drew Fairchild case].

Again, the full context of the testimony and our response to this baseless allegation appear in our response to Impeachment Article II, pp. 87-92, supra.

Article III(2)(F) -- This allegation takes Judge Nixon's testimony grossly out of context, charging as a false statement a single clause in a complex sentence. Judge Nixon told the grand jury that the case was handled in federal court by Judge Cox, or maybe by Judge Russell, "but I never handled any part of it, never had a thing to do with it at all. . . ." House Ex. 2, p. 76. Plainly Judge Nixon was denying having anything to do with the case as a judge in federal court, and that statement was certainly true.

Article III(2)(G) -- This allegation, like Article II, had to be amended by the House in order to reflect Judge Nixon's actual testimony. As explained in our response to Article II, pp. 87-92, supra, Judge Nixon had no basis for thinking he had influenced anyone in connection with the Drew Fairchild case, and his statement was entirely true.

CONCLUSION

For all of the foregoing reasons, the evidence and the law in this case require that, on each Article of Impeachment, Judge Nixon be found NOT GUILTY.

Respectfully submitted,

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Date: October 24, 1989

IN THE SENATE OF THE UNITED STATES
Sitting As A Court of Impeachment

In re)
IMPEACHMENT OF)
JUDGE WALTER L. NIXON, JR.)

JUDGE NIXON'S MOTION TO DISMISS IMPEACHMENT ARTICLE III

Judge Walter L. Nixon, Jr., through his undersigned counsel, hereby moves for an order of the Senate dismissing Impeachment Article III, on the grounds stated:

1. The allegations that an impeachable offense has been made out if "Judge Nixon has raised substantial doubt as to his judicial integrity, undermined confidence in the integrity and impartiality of the judiciary, betrayed the trust of the people of the United States, . . . and brought disrepute on the Federal courts and the administration of justice by the federal courts . . . ."

   These allegations do not make out an impeachable offense under Article II, sec. 4 of the Constitution.

2. Specifications III(2)(A), (D), (E), (F) and (G), which are redundant and multiplicitous of allegations in Impeachment Article I and II.

3. The Article, which charges five different offenses for each of fourteen specific events, thus present seventy allegations. Such a complex and confusing Article is both unfair and completely unworkable.

Respectfully submitted,

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Date: June 23, 1989

IN THE SENATE OF THE UNITED STATES
Sitting As A Court of Impeachment

In re)
IMPEACHMENT OF)
JUDGE WALTER L. NIXON, JR.)

MEMORANDUM IN SUPPORT OF JUDGE NIXON'S MOTION TO DISMISS IMPEACHMENT ARTICLE III

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Impeachment Article III uses three unfair tricks to try to ensure a conviction in this case. First, it charges Judge Nixon with a variety of vague offenses that are not impeachable offenses under Article II, § 4 of the Constitution. Second, it includes numerous redundant allegations, thereby forcing Judge Nixon to defend against the same allegations over and over. Third, it lumps together fourteen supposedly improper actions by Nixon, making it nearly impossible for Nixon to defend against it or for a Senator to make sense out of it.

Because of these inadequacies in Impeachment Article III, the Senate should dismiss both major portions of it and the entire Article itself. [1]

I.

WHAT IS IN IMPEACHMENT ARTICLE III?

Impeachment Article III has four main parts. The first paragraph recites that Judge Nixon, as a federal judge, must "uphold the integrity of the judiciary, . . . avoid impropriety and the appearance of impropriety, and . . . obey the laws of the United States."

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[1] There is precedent for revision of an impeachment article in these circumstances. During the Louderback impeachment in 1933, counsel for Judge Louderback objected to Impeachment Article V, and the House Managers substantially revised Article V to meet his objections. See 76 Cong. Rec. 5475 (Mar. 3, 1933); 77 Cong. Rec. 1883 (Apr. 18, 1933); 77 Cong. Rec. 4085-86 (May 24, 1933).

The theory of Impeachment Article III is then announced in the second paragraph, which accuses Judge Nixon of doing five subjectively bad things:

> [i] Judge Nixon has raised substantial doubt as to his judicial integrity, [ii] undermined confidence in the integrity and impartiality of the judiciary, [iii] betrayed the trust of the people of the United States, [iv] disobeyed the laws of the United States and [v] brought disrepute on the Federal courts and the administration of justice by the Federal courts . . .

Then the Article asserts that Judge Nixon had conversations about the Drew Fairchild case with Wiley Fairchild, Carroll Ingram, and Bud Holmes. The Article does not directly allege that there was anything wrong with those conversations, but accuses him of concealing the conversations in an interview with federal agents on April 19, 1984 and in his grand jury testimony on July 18, 1984. The Article specifies seven supposedly false or misleading statements during the April interview (Subparagraph (1)) and seven supposedly false or misleading statements before the grand jury (Subparagraph (2)). Five of the specified statements in Subparagraph (2) duplicate allegations in Impeachment Articles I and II; [other specifications in Impeachment Article III overlap each other].

By charging Judge Nixon with five offenses in connection with each of the fourteen specifications, Impeachment Article III alleges seventy supposedly impeachable offenses.

II.

IMPEACHABLE OFFENSES CANNOT INCLUDE SUBJECTIVE ALLEGATIONS OF BAD CONDUCT

The Constitution states that a judge may be impeached for "treason, bribery, or other high crimes and misdemeanors." Under that provision, an impeachable offense may be only (i) a judge's abuse of office or (ii) grave criminal acts.

Impeachment Article III does not primarily accuse Judge Nixon of abuse of office or a grave crime, but rather alleges vague and subjective offenses. Specifically, no impeachable offense is stated by four of the central allegations, that Judge Nixon:

-- "has raised substantial doubt as to his judicial integrity"

-- "undermined confidence in the integrity and impartiality of the judiciary"

-- "betrayed the trust of the people of the United States"

-- "brought disrepute on the Federal courts and the administration of justice by the federal courts." [2]

The invalidity of these subjective elements of Impeachment Article III is clear from the Constitution and its history. By limiting impeachable offenses to "treason, bribery, or other high crimes and misdemeanors," the Framers intended to restrict the impeachment power to specific and defined offenses, which included only abuse of office or grave crimes, not Article III's hodgepodge of emotion-charged allegations.

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[2] We agree that, as a matter of constitutional law, the allegation that Nixon "disobeyed the laws of the United States" could state an impeachable offense.

Our challenge to the subjective elements of Article III is strongly reinforced by the constitutional values at stake. The independence of the federal judiciary requires that a judge be impeached only for specific and definite acts. Because the Article is standardless, it encompasses almost any act that the political majority may find offensive or distasteful, thereby exposing a judge to impeachment for controversial acts or conduct. This standardless approach makes the vote on impeachment a referendum of Congressional disapproval rather than the judicial trial intended by the Framers. The Constitution requires a trial.

Finally, dismissal of the subjective elements of Impeachment Article III will sharply focus the issues for the Senate trial, and therefore should shorten the trial. For all of these reasons, the Senate should dismiss the subjective elements of Impeachment Article III.

A. The Constitutional Limits On An Impeachable Offense

Article II, § 4 of the Constitution defines impeachable offenses as "treason, bribery, or other high crimes and misdemeanors." Treason and bribery -- which are not involved in this case -- have fairly precise definitions. Treason is defined in the Constitution: "Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving aid to them." Constitution, Article III, § 3. Bribery is both a concrete act and a federal statutory offense. See 18 U.S.C.A. § 201 (West Supp. 1989). See generally Rotunda, An Essay on the Constitutional Parameters of Federal Impeachment, 76 Ky. L.J. 707, 721 (1987-88); Black, Impeachment: A Handbook 26-27 (1974).

Because the charges in this case are neither bribery nor treason, they must fall within the phrase "high crimes and misdemeanors." Although that phrase seems, on first view, to be quite broad and elastic, the Framers used it to describe a narrow range of offenses, which includes only (i) the abuse of office or (ii) criminal conduct of a grave nature.

> To be impeachable, an act must fall within one of two categories. It must violate some known, established law, be of a grave nature, and involve consequences highly detrimental to the United States. In the alternative, it must involve evil, corrupt, wilful, malicious or gross conduct in the discharge of office to the great detriment of the United States.

Ferrick, Impeaching Federal Judges: A Study of the Constitutional Provisions, 39 Fordham L. Rev. 1, 54-55 (1970-71).

1. The Impeachment Mechanism Was Primarily Intended To Deal With Abuse Of Office

In establishing the grounds for impeachment, the Framers' main concern was abuse of office. James Madison said that a President should be subject to impeachment because he "might pervert his administration into a scheme of peculation or oppression. He might betray his trust to foreign powers." 2 Farrand, The Records of the Federal Convention of 1789 65-66 (1911). Edmund Randolph declared that "[t]he Executive will have great opportunities for abusing his power; particularly in time of war when the military force, and in some respects the public money will be in his hands." Id. at 67. Gouvernor Morris worried that the president "may be bribed by a greater interest to betray his trust; and no one would say that we ought to expose ourselves to the damages of seeing the first Magistrate in foreign pay without being able to guard against it by displacing him." Id. at 68.

These themes were echoed during the state ratifying conventions. James Iredell told the North Carolina convention that "the occasion for the impeachment pcwer's exercise will arise from acts of great injury to the community, and the objects of it may be such as cannot be easily reached by an ordinary tribunal." 4 Elliot, Debates in the Several State Conventions on the Adoption of the Federal Constitution 113 (2d ed. 1836). At the same convention, Governor Johnston stated that impeachment is a mode of trial for "great misdemeanors against the public." 4 Elliot, supra, at 48. Impeachment, therefore, was primarily intended to protect the community from abuse of the public trust and misconduct in office.[3]

2. The Convention Chose Limited Impeachment Powers Rather Than Removal By Address

In selecting a mechanism for the removal of judges, the Framers chose impeachment precisely because it is so limited, and expressly rejected the wide-ranging British system of address for removing judges. This express choice underscores the importance of limiting the grounds for impeachment to maintain the balance among the three branches of government.

In England, the removal of judges by address was established in the Act of Settlement, 12 & 13 Will. 3, c. 2, § 3 (1700), which provided that "Judges Commissions be made Quamdiu se bene gesserint; . . . but upon Address of both Houses of Parliament, it may be lawful to remove them." Parliament could remove a judge by Address by a simple majority vote, without a trial, and there was no limitation whatever on the grounds that could justify an Address. The Framers had firsthand experience with removal by Address, since that system had been adopted by the state constitutions of Maryland, Massachusetts, New Hampshire, and South Carolina. Berger, Impeachment: The Constitutional Problems 145 (1973).

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[3] Many contend that impeachment may be based only to acts performed in an official capacity. See Berger, Impeachment: The Constitutional Problems 193 (1973). We do not argue that impeachment is so limited and agree that private criminal offenses of a grave nature are also impeachable offenses. Accordingly, we do not seek dismissal of Impeachment Articles I and II, which charge a grave crime.

The Framers flatly rejected this method of removing judges. On August 27, 1787, John Dickinson formally proposed a system of Address, suggesting a provision that judges "may be removed by the Executive on the application [by] the Senate and House of Representatives." 2 Farrand, supra, at 428. In response, Gouvernor Morris "thought it a contradiction in terms to say that the judges should hold their offices during good behavior, and yet be removable without a trial. Besides it was fundamentally wrong to subject judges to so arbitrary an authority." Id. Edmund Randolph agreed that Dickinson's proposal should be defeated "as weakening too much the independence of the Judges." Id. at 429. Dickinson's proposal drew but one supporting vote. Id.

3. The History Of "High Crimes And Misdemeanors" Describes A Limited Range Of Offenses

The Framers sought to limit impeachment to specific and defined offenses. In early debate over the impeachment provision, Gouvernor Morris agreed that "corruption and some few other offenses to be such as ought to be impeachable," but he argued that such "cases ought to be enumerated and defined." 2 Farrand, supra, at 65. (emphasis added).

Later in the Convention, George Mason and James Madison debated what was an impeachable offense. Seeking to expand the draft impeachment provision, which then included only treason and bribery as impeachable offenses, Mason asked, "Why is the provision restrained to treason and bribery only? Treason as defined in the Constitution will not reach many great and dangerous offenses. [Warren] Hastings [then on trial in Parliament] is not guilty of treason. Attempts to subvert the Constitution may not be treason as above defined." 2 Farrand, supra, at 550. Mason then moved to add "or maladministration" as a grounds for impeachment. Id.

Madison vigorously opposed "maladministration," which he thought would sap the independence of the executive and the judiciary. Madison stated that "[s]o vague a term will be equivalent to a tenure during pleasure of the Senate." Id. Mason then withdrew "maladministration" and substituted "other high crimes and misdemeanors against the State."[4]

This colloquy illustrates the limits of "high crimes and misdemeanors." The Framers intended that the impeachment standard be distinct and definite. A vague term like

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[4] The phrase "other high crimes and misdemeanors against the State" was changed to "other high crimes and misdemeanors against the United States." In its report of September 12, the Committee of Style and Arrangement deleted the words "against the United States." See Fenton, The Scope of Impeachment Power, Nw. U.L. Rev. 719, 730 (1970).

"maladministration" could be abused, resulting in service "at the pleasure of the Senate." Therefore, "high crimes and misdemeanors" was adopted to provide real limits on the impeachment power. See generally Fenton, The Scope of Impeachment Power, 65 Nw. U.L. Rev. 719, 731 (1970).[5]

Those limits were clear in British case law. One authority summarizes those precedents as classing "high crimes and misdemeanors" in the following catagories: misapplication of funds, abuse of official power, neglect of duty, encroachment on or contempt of Parliament's prerogatives, general corruption, betrayals of public trust by exposing the nation's military defenses to significant risks, and pernicious advice to the Crown. Berger, supra, at 70-71. This historical background demonstrates: "(i) when the Framers employed language having a common law meaning it was expected that those terms would be given that meaning; (ii) the Framers thought the phrase had a 'limited', 'technical' meaning." Id. at 71. The offenses in most English impeachments were treason, criminal or corrupt acts, or gross abuse of official powers. Therefore, one scholar has commented, there is little English precedent for impeachment on grounds other than 1) a crime or 2) gross abuse of official duties. Ferrick, supra, at 49.

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[5] Although the Framers thought that "maladministration" was too vague to describe an impeachable offense, the term was still circumscribed by its use in similar contexts. At the time of the Convention, the constitutions of New Jersey, Pennsylvania, and Vermont provided for removal of judges for maladministration. See Berger, supra, at 145. Maladministration was defined in early dictionaries as mismanagement of one's office. See N. Baly, Dictionary (1753); S. Johnson, Dictionary of the English Language (3d ed. 1765); T. Sheridan, A General Dictionary of the English Language (1780). Therefore, although the term was rejected for its vagueness, "maladministration" in fact had discernible limits.

Indeed, in another context the Framers rejected the phrase "high misdemeanors" because it "had a technical meaning too limited." The draft Constitution provided that a fugitive from justice charged with "treason, felony or high misdemeanors" should be returned from the state from which he fled. In the Convention, "the words 'high misdemeanor' were struck out, and 'other crime' inserted, in order to comprehend all proper cases; it being doubtful whether 'high misdemeanor' had a technical meaning too limited." 2 Farrand, supra, at 174, 443. For the impeachment provision, however, the Framers adopted the phrase because of its "limited" "technical meaning."[6]

4. The Independence Of The Judiciary Would Be Threatened By An Expansive View Of An Impeachable Offense

To preserve the independence of the federal judiciary, the Senate must respect the limits on impeachment. "The complete independence of the courts of justice is peculiarly essential in a limited Constitution." The Federalist Papers, No. 78 at 466 (A. Hamilton). The Framers plainly recognized the importance of freeing the judiciary from the other branches of government. James Wilson told the Convention that "the Judges would be in a bad situation if made to depend on every gust of faction which might prevail in the two branches of our Government." 2 Farrand, supra, at 429.

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[6] Moreover, the rule of legal construction, ejusdem generis, further limits the impeachable offenses under "high crimes and misdemeanors." Ejusdem generis provides that when a general word follows a number of specific words, the meaning of the general word is restricted to the same class of things described by the specific words. In the present case, the meaning of "high crimes and misdemeanors" therefore is confined to the same group or class of acts as "treason" and "bribery." See Black, supra, at 36-37.

The judiciary's independence is protected by life tenure and the ban on reducing a judge's compensation. As Hamilton wrote:

> If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.

The Federalist Papers, No. 78 at 469 (A. Hamilton).

In formulating impeachment as the only limitation on life tenure, the Framers wanted to maintain the independence of the judiciary, while providing for removal if public security required it. Impeachment was a delicate matter, and the Framers proceeded cautiously.

B. The Application Of "Other High Crimes And Misdemeanors" In Earlier Impeachments

There have been fourteen impeachments before this case. Only in the more recent cases have vague and subjective allegations similar to those in Impeachment Article III been included in impeachment articles.[7]

Three impeachments have been based on treason or bribery. One judge was impeached for treason [West Humphreys (1862)], as was a senator [William Blount (1797)]. Secretary of War William Belknap was impeached in 1876 for receiving bribes.

Ten impeachments have been for the "high crime" or "high misdemeanor" of abusing public office. These have included allegations of drunkenness on the bench [Judge John Pickering (1803)], exceeding judicial powers [Pickering; Justice Samuel Chase (1804); Judge James Peck (1830); Judge Charles Swayne (1905); Judge George English (1926); Judge Harold Louderback (1933)], exceeding executive powers [President Andrew Johnson (1868)], and using judicial office for personal profit [Judge Robert Archbald (1912), Judge Halstead Ritter (1936), and Judge Alcee Hastings (1988)]. Three prior impeachments -- of Judge Ritter, Judge Hastings and Judge Harry Claiborne (1986) -- have charged criminal conduct completely unrelated to the conduct of public office.

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[7] Of the fourteen prior impeachments, five have resulted in conviction, three were mooted by resignation, five ended in acquittals and one is pending.

In recent impeachments, however, the House has become enamored of the tactical device of charging the respondent with being a generally bad person who has brought discredit on the judiciary. The first such effort came in the Louderback case, when the last article of impeachment listed a string of bad acts and charged that they were "all to the scandal and disrepute of said court and administration of justice therein." That "catch-all" allegation did not stick; Louderback was acquitted on all counts. Both Judge Ritter and Judge Claiborne, however, were convicted on such "catch-all" articles. Indeed, Ritter was acquitted on all counts except the "catch-all." Both Judges Hastings and Nixon now face similar catch-all articles. The Senate should no longer allow such a blatantly unfair prosecutorial device, and should insist that the constitutional limits on impeachment be observed.

C. The Subjective Elements Of Impeachment Article III Do Not State An Impeachable Offense

1. A Close Examination Of Impeachment Article III

The subjective elements of Impeachment Article III charge vague and undefinable offenses:

> "Judge Nixon has raised substantial doubt as to his judicial integrity;"
>
> "Judge Nixon has . . . undermined confidence in the integrity and impartiality of the judiciary;"
>
> "Judge Nixon has . . . betrayed the trust of the people of the United States;"

> "Judge Nixon has . . . brought disrepute on the Federal courts and the administration of justice by the Federal courts."

Not one of these allegations constitutes either a crime or an abuse of office.

Rather, these allegations focus upon the general reputation and character of Judge Nixon. Indeed, it might even be argued that Judge Nixon was guilty of bringing "disrepute" on the federal courts when the House approved Impeachment Articles I and II. Because Judge Nixon has been impeached by the House, and was convicted in an unfair trial, is he to be deemed a "bad man" and removed from the federal bench for bringing disrepute on the courts?

The Constitution requires that an impeachable offense be a specific act, and these subjective allegations cannot constitute an impeachable offense.

> The phrase "high Crimes and Misdemeanors" carries another connotation -- that of distinctness of offense. It seems that a charge of high crime or high misdemeanor ought to be a charge of definite act or acts . . . . General lowness and shabbiness ought not to be enough.

Black, supra, at 40 (emphasis in original).

The subjective elements of Impeachment Article III defy constitutional limitations. Almost any unpopular act or judicial decision could raise "substantial doubt as to [one's] judicial integrity, undermine[] confidence in the integrity and impartiality of the judiciary, betray[] the trust of the people of the United States," and bring "disrepute on the Federal courts and the administration of justice by the Federal courts." The only limit to impeachment under these provisions is the imagination. Impeachable offenses could include:

- -- issuing unpopular judicial decisions, such as striking down on constitutional grounds a statute banning desecration of the flag
- -- the youthful indiscretion of smoking marijuana
- -- reckless driving that causes a traffic fatality
- -- being arraigned on charges of driving while intoxicated
- -- any association with disreputable members of the community
- -- openly engaging in an extramarital affair
- -- attending a meeting of the Communist Party
- -- investing with someone who was later convicted of inside trading

All of these acts certainly can "undermine confidence in the integrity and impartiality of the judiciary" or "bring disrepute on the Federal courts and the administration of justice." The subjective elements of Impeachment Article III thus allow impeachment for any act that the majority may find offensive or distasteful. Under this Article, the independence of the judiciary would be compromised. This is contrary to the intent of the Framers:

> The judiciary, . . ., has no influence over either the sword or the purse; no

> direction either of the strength or of the wealth of the society, and can take no active resolution whatever. . . .
>
> This simple view of the matter suggests several important consequences. It proves incontestably that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks.

The Federalist Papers, No. 78, at 465-66 (A. Hamilton) (emphasis added).

2. The Subjective Elements Of Impeachment Article III Are Standardless

The subjective elements of Impeachment Article III provide no standards for the Senate to apply when voting on it, or for judges to apply to their conduct. What evidence or facts will a Senator examine to determine whether the courts have been brought into disrepute? Or whether public confidence has been undermined? What standard of proof will he apply to that decision? Beyond a reasonable doubt? Clear and convincing evidence?

In enacting criminal statutes, Congress must establish the boundaries of criminal conduct. "It is rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited." Dunn v. United States, 442 U.S. 100, 112 (1979). In United States v. L. Cohen Grocery Co., 255 U.S. 81 (1921), the Supreme Court evaluated a criminal statute which prohibited "wilfully . . . mak[ing] any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries." Striking down the law, the Court stated, "*Observe that the section forbids no specific or definite act*. . . . It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against." 255 U.S. at 89 (emphasis added). In a proceeding as important as impeachment, the same principles must apply.

For federal judges, moreover, the subjective elements of Impeachment Article III provide a vague and shifting boundary between permanent tenure and ouster from the federal bench. Such an uncertain boundary must be unsettling, and could further deter prospective judges. Finally, any weakening of judicial independence and tenure only erodes the courts' ability to protect individual rights.

3. *A Modest Proposal*

We propose a simple test of the subjective elements of Impeachment Article III: Can those allegations be inserted in Article II, § 4 and still preserve the integrity of that Constitution provision? The result is instructive:

> "The President . . . shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, *and raising substantial doubt as to his integrity*."

> "The President . . . shall be removed from Office on Impeachment for, and Conviction of, Treason,

> Bribery, and bringing disrepute on the Federal courts."

As this exercise demonstrates, the subjective elements of Impeachment Article III have no place in the impeachment process and represent a gross expansion of impeachable offenses beyond the intent of the Framers. Dismissing the subjective elements will both restore constitutional limits and streamline this impeachment proceeding.

III.

THE SENATE MUST DISMISS IMPEACHMENT ARTICLE III(2)(A), (D), (E), (F) AND (G) AS MULTIPLICITOUS AND REDUNDANT

Specifications 2(A), (D), (E), (F), and (G) of Impeachment Article III should be dismissed as redundant. Those specifications simply restate the allegations of Impeachment Articles I and II. In response to our Answer, the House Managers concede that these specifications are redundant:

> [T]he House of Representatives agrees that the statement of Respondent set forth in Article I is also the basis for Article III(2)(A), and that the Statements of Respondent set forth in Article II are also the basis for Article III(2)(D), (F) and (G) . . . . [T]he House of Representatives acknowledges that the statements set forth in Articles II and III(2)(E) were each part of the Respondent's response during his grand jury testimony . . .

Replication of the House of Representatives to the Answer of Judge Walter L. Nixon, Jr. to the Articles of Impeachment at 5. Those redundant allegations should be dismissed.

Redundant claims often are dismissed in civil litigation in the interests of clarity and economy. *See* Fed. R. Civ. P. 12(f); *see*, *e.g.*, *Davidson v. John Deere & Co.*, 644 F. Supp. 707, 713 (N.D. Ind. 1986); *United States v. 18.2 Acres of Land More or Less*, 442 F. Supp. 800, 811 (E.D. Cal. 1977); *Town of East Troy v. Soo Line Railroad Company*, 409 F. Supp 326, 330 (E.D. Wis. 1976). In criminal cases, a prosecutor may not charge the same offense in multiple counts of an indictment. *See*, *e.g.*, *United States v. De la Torre*, 634 F.2d 792, 794 (5th Cir. 1981); *Gebhard v. United States*, 422 F.2d 281, 289-290 (9th Cir. 1970).

Once a judgment has been rendered in any proceeding, the parties involved cannot relitigate the same issue. In the criminal context, this proscription against relitigation is expressed in the double jeopardy clause of the Fifth Amendment. *See*, *e.g.*, *Abney v. United States*, 431 U.S. 651 (1977). In the civil context, so long as the parties are the same, relitigation of the same issue is barred by the doctrine of *res judicata*. *See*, *e.g.*, *Brown v. Felson*, 442 U.S. 127 (1979).

In this case, however, Judge Nixon could be acquitted on the first two impeachment articles, but still be convicted on the third article -- on the basis of exactly the same facts that are the basis for the first two articles. Specifications 2(A), (D), (E), (F) and (G) allege no facts different from the facts alleged in Articles I and II. If the Senate acquits Judge Nixon of the allegations on the first two Articles, he should not face liability for the same allegations in Article III(2)(A), (D), (E), (F), and (G). Whether impeachment is viewed as a civil or a criminal proceeding, the result is the same -- the House Managers are entitled to only "one bite at the apple".

Accordingly, this motion to strike the redundant specifications of Impeachment Article should be granted.

IV.

IMPEACHMENT ARTICLE III IS SO COMPLEX AND CONFUSING THAT IT SHOULD BE DISMISSED

Impeachment Article III alleges that Judge Nixon committed five different offenses ("bringing the judiciary into disrepute," etc.), in connection with each of fourteen separate events. The House Managers thereby include seventy different charges in a single article of impeachment. Such a welter of charges in a single Article can only confuse and complicate this trial. The entire Article should be dismissed.

This motion is supported by the ban on "duplicitous" charges in a criminal case. "Duplicity" is the joining of two or more separate and distinct offenses into a single count of an indictment. See, e.g., United States v. UCO Oil

Co., 546 F.2d 833, 835 (9th Cir. 1976), cert. denied, 430 U.S. 966 (1977); Kearney, 444 F. Supp. 1290, 1292 (S.D.N.Y. 1978). The vices of a duplicitous count are obvious:

> One vice of duplicity is that a general verdict for a defendant on that count does not reveal whether the jury found him guilty of one crime or not guilty of both. . . . Another vice of duplicity is that a general verdict of guilty does not disclose whether the jury found the defendant guilty of one crime or both . . . . Finally, there is no way of knowing with a general verdict on the separate offenses joined in a single count whether the jury was unanimous with respect to either.

United States v. Starks, 515 F.2d 112, 116-17 (3d Cir. 1975), aff'd sub nom., Abney v. United States, 431 U.S. 65 (1977). The prohibition against duplicity stems from the "Sixth Amendment's guarantee that a defendant be adequately informed of the nature and cause of the accusation and the Fifth Amendment's interdiction against double jeopardy." United States v. Kearney, 444 F. Supp. at 1292. When confronted with a duplicitous indictment, the courts routinely order remedial action, including dismissal. E.g., Starks, 515 F.2d at 116-118; Kearney, 444 F. Supp. at 1295.

The same point has been made, with great force, in impeachment proceedings. During the Louderback case, Senator Bailey of North Carolina condemned the tactical ploy of loading up an impeachment article with a variety of supposed wrongdoing.

> **The final article of the articles of impeachment, in my judgment, ought not to have been considered. It was a summary of the four preceding articles, as sort of [a] catchall designed to collect all of the votes of "guilty" in the four preceding articles, and so by accumulation to gather two thirds of the Senate to sustain the impeachment, which could not be sustained on any of the articles or on all four considered separately. . . . This course is prejudiced, and it is to be hoped that it will not be repeated. A respondent ought to be tried upon the articles, and, if acquitted on each, he ought not to be convicted on all of them assembled in one article.**

77 Cong. Rec. 4238 (May 26, 1933) (emphasis added).

In this case, the complexity of having seventy offenses in Impeachment Article III effectively destroys Nixon's right to be removed only by a two-thirds vote. For example, a senator might justify a vote for conviction if he determined that Judge Nixon committed only one of the seventy specified offenses. Assume that for each of the seventy alleged offenses, only one Senator is persuaded of Judge Nixon's guilt. If each of those seventy senators votes to convict on that Article, however, there would be 70 Senators voting for conviction. Judge Nixon then would be removed from office even though, had the seventy specifications been voted on separately, there would have been only one vote for conviction on each charge. This clearly unacceptable outcome vividly illustrates the vices of Impeachment Article III.

CONCLUSION

Impeachment Article III is vague, redundant, complex and confusing. It is unfair to Judge Nixon and unworkable for the Senate. It should be dismissed.

Respectfully submitted,

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IN THE SENATE OF THE UNITED STATES
Sitting As A Court Of Impeachment

In re
IMPEACHMENT OF
WALTER L. Nixon, JR.

JUDGE NIXON'S SUMMARY OF FACTS

The following summary of facts is based on the evidentiary hearings before the Senate Impeachment Committee on September 7, 8, 12 and 13, as well as materials from earlier proceedings that already have been admitted in the record.[1]

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[1] In this summary of facts, the following citation system will be used:

> Testimony at Senate hearings will be cited as "Senate [page no.] (witness)."
>
> Testimony at the hearings before the Subcommittee on Civil and Constitutional Rights and Liberties of the House Judiciary Committee on June 9, 10 and July 6, 7, 8 and 12, 1988 will be cited as "House [page no.] (witness)."
>
> Testimony before the post-conviction hearing in Jackson, Mississippi on August 29-30, 1988 will be cited as "Post-Conviction [page no.] (witness)."
>
> Testimony at Judge Nixon's trial will be cited as "Trial [page no.] (witness)."
>
> From the Senate proceedings, exhibits of the House Managers are cited as "HX" and Judge Nixon's exhibits will be cited as "RX."

In an attempt to organize the facts involved, this summary will be divided into the following categories:

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I.

FALSE IMPEACHMENT ARTICLES

1. Impeachment Articles II and III(2)(G) wrongly accuse Judge Nixon of the stating to the grand jury that he "'never talked to anyone, State or Federal, prosecutor or judge, in any way influence anybody' with respect to the Drew Fairchild case." As the audio tape of the statement reveals, Judge Nixon actually said that he "never talked to anyone, State or Federal, prosecutor or judge, that in any way influenced anybody" with respect to the Drew Fairchild case, and the House Managers so conceded. See Senate 622-24 (stipulation by House Managers and counsel for Judge Nixon).

2. Article III(2)(B) wrongly charges that Judge Nixon made the statement that "To the best of his knowledge and recollection, Judge Nixon did not know of any reason he would have met with Wiley Fairchild after the Nixon-Fairchild oil and gas investment was finalized in February 1981." What Judge Nixon actually said was:

> I don't know of any reason I would have met with him after the transaction was finalized in the first part of 1981, but I can't say for sure. It's possible. You're asking me about -- I -- I don't like to keep repeating it -- but three or four years ago, and I'm trying to reconstruct this to the best of my recollection and knowledge.

HX 2, p. 56. As corrected, Judge Nixon's actual statement admits there may have been further meetings with Wiley

Fairchild and thus is directly contrary to the inaccurate "statement" created for the Impeachment Article.

3. Article III(2)(C), asserts that Judge Nixon testified that he "gave the grand jury all the information that he had and that he could, and had withheld nothing during his grand jury testimony." Judge Nixon's actual testimony was as follows:

> I came here voluntarily and am very happy to cooperate with this grand jury and give them all the information that I have and that I could. . . . I have nothing at all to -- had nothing to hide or nothing to withhold and I brought everything that you have asked me to bring.

HX 2, pp. 75-76. Contrary to the House's allegation, Judge Nixon's words did not guarantee the completeness of the information he had given the grand jury, but described, if anything, his attitude toward appearing before the grand jury.

4. Article III(1)(D) cites Judge Nixon's statement, in the interview with the investigators, that "nothing was done or nothing was ever mentioned about Wiley Fairchild's son." Standing on its own, this statement does not even make sense. Read in context, Judge Nixon plainly was responding to questions by the prosecutor about the date of his purchase of oil properties, and whether there had been anything asked of him by Wiley Fairchild in connection with that purchase and Wiley's son's case. HX 1, at 37. Judge Nixon responded with

the referenced statement, adding, among other things, that "if I even suspected something like that was going on, I certainly wouldn't have ah invested or have any dealings, absolutely." *Id*. Judge Nixon thus stated that his purchase of oil properties had no connection to Drew's case, and that Drew's case never came up when he was negotiating the purchase with Wiley, both of which facts are undisputed. *See* Findings 33, 35, *infra*.

II.

THE INDIVIDUALS INVOLVED

A. Judge Nixon

5. Judge Nixon has been known never to do anything to cause any embarrassment to his court or himself. RX 63, p. 34 (transcript of tape-recorded statement of Holmes); Senate 252-53 (Holmes).

6. Judge Nixon is perceived in his community as a fine, ethical judge, and has an excellent reputation. Senate 414 (Ingram); Senate 730 (remarks of Rep. Edwards).

7. Judge Nixon's reputation for truthfulness and veracity is excellent. Senate 469 (Eppes); Senate 476 (Denton); Senate 485-86 (Beer); Senate 506 (Graves); Senate 511 (Saxon).

8. Judge Nixon was appointed to the United States District Court for the Southern District of Mississippi in

1968, at the age of 39. He left a successful law practice to take the bench. Senate 515-16 (Nixon).

9. Judge Nixon served as Chief Judge of the Southern District of Mississippi beginning in 1982, was president of the Fifth Circuit District Judges Association and also served on the Fifth Circuit Judicial Council. Senate 518-19 (Nixon); House 417-18 (Nixon).

B. Wiley Fairchild

10. Wiley Fairchild, who is now in his late seventies, is a very successful businessman involved in construction and oil and gas investing. Although he left school after the fourth grade, the company he runs has annual revenues exceeding $5 million in a weak year. Trial 462 (W. Fairchild).

11. When Judge Nixon stated to Wiley Fairchild that he would help him if he could, and would just tell him if he could not help Mr. Fairchild, Mr. Fairchild understood Judge Nixon's remarks simply as a statement of personal courtesy between two people who were in a business transaction. He did not understand Judge Nixon to be offering to do anything illegal or improper, and Judge Nixon was not making such an offer. House 176, 204 (W. Fairchild); Senate 160 (W. Fairchild); Senate 527 (Nixon).

12. At the time of the events at issue in this case, Wiley Fairchild was estranged from his son, Drew, and the two of them were not on speaking terms. Their relationship had

been bad for some time. Senate 133, 179 (W. Fairchild); Senate 372 (Ingram).

C. Bud Holmes

13. Mr. Holmes was elected District Attorney for Forrest and Perry Counties in Mississippi from 1980 through 1983. Senate 205-06, 295 (Holmes).

14. Mr. Holmes is well-known for spending a lot of time on the telephone. Trial 791, 911, 926 (Holmes); Trial 1260 (White); Trial 1350-52 (Matison).

15. Mr. Holmes is known to be "expressive" and "colorful." Senate 417-18 (Ingram).

D. Carroll Ingram

16. Mr. Ingram is an attorney in private practice in Hattiesburg and has represented his relative, Wiley Fairchild, on many occasions. Senate 363, 366 (Ingram).

17. Mr. Ingram was a member of the Mississippi State Senate from 1971 to 1979, and chaired the Senate Judiciary Committee. Senate 363 (Ingram).

III.

THE OIL PROPERTIES

18. In the period from 1979 through 1981, Judge Nixon spoke with several friends who were successful in business and asked them to keep him in mind if any investment opportunities arose. Judge Nixon was seeking to develop

investment income to meet anticipated educational expenses for several of his seven children. Senate 366-67 (Ingram); Senate 520-22 (Nixon).

19. The oral agreement for Judge Nixon to purchase oil properties from Wiley Fairchild was reached in late 1979 or early 1980, several months before the drug bust at the Hattiesburg Airport that involved Drew Fairchild. Trial 1036-38 (Ingram); House 341-42 (Ingram); Post-Conviction 213 (W. Fairchild); House 217-18 (W. Fairchild); Senate 370, 404 (Ingram); HX 42, p. 4 (Stipulation Nos. 33-34).

20. The deeds reflecting the sale of oil interests from Wiley Fairchild to Judge Nixon were publicly recorded in the land records of Mississippi and Alabama. HX 5; House 368-69 (Ingram); House 162 (W. Fairchild).

21. It was not unusual for Mr. Fairchild to lend money to an investor to finance an investment, Senate 433 (Ingram), nor was it unusual for Mr. Fairchild to sell oil interests, which was his business. House 344 (Ingram).

22. Judge Nixon intended to take out a bank loan to pay for the oil interests he bought from Wiley Fairchild. Senate 523 (Nixon); Trial 1491-92 (Nixon).

23. When Carroll Ingram called Judge Nixon to say that he would be bringing the deeds for the oil interests to Judge Nixon's Biloxi chambers in Biloxi in the next day or two, Judge Nixon said he would need time to arrange his financing; Mr. Ingram advised Judge Nixon that Wiley Fairchild would

"carry the paper," or finance the transaction at a reasonable rate of interest. Senate 523 (Nixon); Trial 1491-92 (Nixon); House 424-25 (Nixon).

24. Judge Nixon never requested that Wiley Fairchild lend him the money for the oil interests. Senate 523, 559 (Nixon).

25. Judge Nixon's loan from Fairchild Construction was reflected in a written instrument and was discharged in a timely manner, with one of the loans repaid before it was due. HX 6; HX 42, p. 5 (Stipulation Nos. 39, 42).

26. On his annual financial disclosure form for 1981, Judge Nixon fully reported the oil and gas interests that he purchased from Wiley Fairchild. RX 11.

27. When he sold the oil interests to Judge Nixon, Wiley Fairchild had no intent to corrupt Judge Nixon, was not aware of any case he had before Judge Nixon, and was not trying to get favors from Judge Nixon. House 195, 204 (W. Fairchild); RX 30, pp. 38, 78 (W. Fairchild grand jury, July 18, 1984).

28. Wiley Fairchild made a large profit on the oil interests he sold to Judge Nixon, between 1300 per cent on one of the interests and more than 8,000 per cent on another. RX 32A; Senate 155 (W. Fairchild); House 195, 201 (Wiley Fairchild); RX 30, p. 41 (Wiley Fairchild grand jury, July 18, 1984). The transaction was "no big deal" to Mr. Fairchild. Senate 113 (W. Fairchild).

29. The price charged to Judge Nixon for the oil and gas interests by Wiley Fairchild was a fair price. Trial 565, 592-93 (W. Fairchild); House 196, 199-200 (W. Fairchild); Senate 155-56 (W. Fairchild); RX 22, p. 2 (FBI memorandum of interview).

30. The value of the oil interests sold to Judge Nixon by Wiley Fairchild would have increased considerably between early 1980 (when the oral agreement on the sale was reached) and February 1981 (when the written deeds were executed) because there were positive tests on the properties in the summer of 1980, after the sale had been agreed to. RX 75A, 75B; Trial 504 (Wiley Fairchild); House 200 (Wiley Fairchild).

31. Although the written deeds were not executed until early 1981, they were dated at the time of the verbal agreement in early 1980, which is customary in the oil business. RX 30, pp. 58-59 (W. Fairchild grand jury, July 18, 1984); Trial 502 (W. Fairchild); House 165, 196, 203 (W. Fairchild); Senate 198 (W. Fairchild); Senate 426 (Ingram); Trial 1060-61 (Ingram); Trial 1405-07 (Massey); Trial 319 (Jarvis).

32. The acreage listed in the final deeds (HX 5) accurately reflects the transaction as Wiley Fairchild initially intended it to occur, and corrected an error in the draft deeds prepared by Skip Jarvis. House 164 (Wiley Fairchild); Senate 370-71 (Ingram).

33. The sale of oil interests to Judge Nixon never had anything to do with Drew Fairchild's case. Senate 156 (W. Fairchild); Senate 393, 403 (Ingram); Senate 559-60 (Nixon); House 195 (W. Fairchild); RX 27 (FBI memorandum of interview); RX 30, pp. 38, 65 (W. Fairchild grand jury testimony, July 19, 1984). Prosecutor Weingarten told the jury at trial that the government initially believed that the oil transaction was connected to the Drew Fairchild case, "but at this point it's clear that there is no such connection." RX 62, p. 1878; see RX 80 (Newspaper report that Prosecutor Weingarten stated that gratuity charge was not proved).

34. After he purchased the three oil interests from Wiley Fairchild that are reflected in the deeds identified as House Managers' Exhibit 5, Judge Nixon never requested or raised the subject of purchasing any oil interests from Wiley Fairchild. Senate 526 (Nixon).

35. Mr. Ingram always told the prosecutors that the oil transaction was completely proper and had no connection to Drew Fairchild's case. In February 1985 the prosecutors told Mr. Ingram that they accepted his description of the transaction as true and would use his testimony as the "measuring stick" for the oil transaction thereafter, but they still indicted Judge Nixon for allegedly receiving an illegal gratuity in the transaction. Senate 393-94, 402-03 (Ingram); HX 28.

36. In 1981, Judge Nixon bought three other oil and gas interests from three other individuals in Mississippi, as part of his effort to develop investment income to meet anticipated education expenses. Judge Nixon borrowed the money for these other three investments as well. Senate 522-23 (Nixon); House 425-27 (Nixon); House Ex. N-12.

37. Judge Nixon did not make a profit on any of the other three oil and gas interests, but he has paid off the loans he had made when he purchased those interests. Senate 524-25 (Nixon).

38. Wiley Fairchild asked Judge Nixon to keep in touch with him, and Judge Nixon did call Mr. Fairchild or drop by to say hello on occasion. Senate 526, 530 (Nixon); House 430 (Nixon).

IV.

DREW FAIRCHILD CASE

39. Drew Fairchild, the 50-year-old son of Wiley Fairchild and partner in an airplane service business at the Hattiesburg Airport, was involved in a conspiracy to import marijuana into the Hattiesburg Airport. HX 14; HX 15; HX 42, p. 6 (Stipulations Nos. 49, 50).

40. The marijuana-importing conspiracy unraveled when a planeload of marijuana was seized at the Hattiesburg Airport on August 4, 1980, and four suspects were arrested. RX 2, RX 3; HX 42, p. 6 (Stipulation No. 49).

41. One of the arrested conspirators, Charles Malone, made a deal with the federal government and provided extensive information about the conspiracy and its participants, including Drew Fairchild and his business partner, Robert Royals. RX 69.

42. After being solicited by Hattiesburg attorney William Porter, Drew Fairchild retained Porter to represent him in connection with the investigation of the drug conspiracy. Trial 137-40 (D. Fairchild); RX 28, p. 1 (FBI memorandum of interview).

43. Porter and Drew Fairchild consulted with local District Attorney Paul "Bud" Holmes, who recommended that Drew Fairchild make a deal with U.S. Attorney George Phillips. Holmes, who was a very close friend of Porter's, made an appointment with Phillips for Porter and Drew Fairchild. Senate 214-15, 264-65 (Holmes); Senate 70-71 (White-Spunner); RX 29, p. 4 (FBI memorandum).

44. George Phillips also was a good friend of Mr. Holmes' from Hattiesburg. Mr. Holmes and Mr. Phillips spoke with each other on the telephone on a daily basis. RX 46, p. 27 (Holmes grand jury testimony, Feb. 21, 1985); RX 55, p. 12 (Holmes grand jury testimony, June 28, 1985); Senate 265 (Holmes).

45. On November 19, 1980, Drew Fairchild signed a Memorandum of Understanding with the U.S. Attorney under which he agreed to plead guilty to one felony charge

concerning the drug-smuggling conspiracy and to cooperate with the federal investigators, in return for a recommendation of sentence of five years' probation and a $15,000 fine. HX 15; HX 42, p. 6 (Stipulation No. 53).

46. No federal charges were brought against Drew Fairchild in 1980 and 1981, although the federal investigators were dissatisfied with his cooperation. Senate 271 (Holmes); Trial 218-19 (Phillips).

47. In April 1981, Bill Porter filed a lawsuit in Mississippi state court against his client, Drew Fairchild, seeking to compel payment of a $10,000 fee in connection with the drug case. RX 4.

48. On July 3, 1981, Wiley Fairchild paid Porter $2,669.19 to attempt to settle Porter's claim for attorney fees from Drew Fairchild. RX 5; Senate 130 (W. Fairchild).

49. In the summer of 1981, Bill Porter complained to Bud Holmes, his good friend, that Drew Fairchild had not paid Porter's fee. Holmes called George Phillips, the U.S. Attorney, to determine if he could take over the prosecution of Drew Fairchild in state court. Phillips agreed to Holmes' request. Trial 732-34, 796, 837-38 (Holmes).

50. Holmes indicted Drew Fairchild for the "primary" purpose of helping Porter collect his full fee. Senate 217, 274-75 (Holmes); RX 55, p. 14 (Holmes grand jury testimony, June 28, 1985); Trial 843-44 (Holmes).

51. Mr. Porter told Mr. Royals that if Mr. Porter told Bud Holmes to indict Drew Fairchild, Mr. Holmes would do so; Mr. Porter also told Mr. Royals that if he told Mr. Holmes not to indict Drew Fairchild, there would be no such indictment. RX 60, p. 1 (FBI memorandum of interview).

52. Mr. Holmes agrees that it was disgraceful to indict Drew Fairchild to help Bill Porter collect a fee. Senate 275 (Holmes); Trial 846 (Holmes).

53. Mr. Holmes called the Mississippi Bureau of Narcotics daily, or even several times a day, in his effort to take over the Drew Fairchild criminal prosecution from the federal government. RX 20, p. 2 (FBI Memorandum of interview).

54. The agents of the Mississippi Bureau of Narcotics preferred to have the case handled at the federal level, and did not want Mr. Holmes handling the case. Senate 70 (White-Spunner).

55. The agents of the Mississippi Bureau of Narcotics refused to testify before the state grand jury concerning Drew Fairchild until Mr. Holmes appealed to their superior, who directed them to cooperate in Mr. Holmes' presentation to the state grand jury. RX 29, p. 5 (FBI memorandum); House 238 (Holmes); RX 54, p. 2 (FBI memorandum of interview).

56. Assistant District Attorney Katie Matison was assigned to prepare the Drew Fairchild case for presentation to a state grand jury. Senate 276 (Holmes).

57. As part of her preparation, Ms. Matison prepared a list of 10 participants in the drug-smuggling conspiracy and prepared a synopsis of the testimony of Charles Malone, the cooperating federal witness. Trial 1336-37 (Matison); RX 69.

58. Ms. Matison listed Robert Royals, who had served as a pilot for Bud Holmes, as one of the participants in the drug-importation conspiracy, and Mr. Malone's statement included at least four references to Mr. Royals' participation in the conspiracy. RX 69; Trial 1336-37 (Matison).

59. Mr. Holmes knew that Bill Porter, his good friend, represented Mr. Royals and that Mr. Royals and Mr. Porter were friends. Senate 266 (Holmes); Trial 849 (Holmes).

60. Mr. Holmes told Bob Royals that he (Royals) was suspected of involvement in the drug smuggling conspiracy, RX 46, p. 15 (Holmes grand jury testimony, Feb. 21, 1985), and Mr. Holmes learned after the bust in August 1980 that suspicion focused on Mr. Royals. RX 32, p. 11 (Holmes Grand Jury testimony, July 20, 1984).

61. From Ms. Matison's materials, Mr. Holmes selected two defendants to be indicted by the state grand jury, Drew Fairchild and the fugitive pilot of the airplane (Robert Watkins); Mr. Holmes elected not to prosecute Robert Royals. Trial 1336-37 (Matison).

62. The state grand jury indicted Drew Fairchild on August 26, 1981. HX 16; RX 8.

63. Bud Holmes called Wiley Fairchild to inform him of the indictment of Drew Fairchild. Trial 477 (W. Fairchild); Senate 119 (W. Fairchild).

64. At Drew Fairchild's arraignment on September 3, 1981, Wiley Fairchild paid the balance of Bill Porter's demand for fees, $7,500, and Porter showed the check to others in the courtroom in celebration. RX 6; Senate 133 (W. Fairchild); Senate 278 (Holmes); RX 32, p. 25 (Holmes grand jury testimony, July 20, 1984).

65. At some point, Bob Royals came to Wiley Fairchild and said that Bill Porter, Drew's lawyer, had stated that if Wiley would get up off his money his son would not get into any trouble. Senate 119 (W. Fairchild).

66. Wiley Fairchild concluded from Mr. Royals' statement that Bud Holmes was trying to blackmail him, and that made him angry. Senate 120 (W. Fairchild).

67. In December 1981, before any further prosecutive action was taken in the Drew Fairchild case, the fugitive pilot Watkins was seized in Texas, and the State of Mississippi promptly began extradition proceedings to have him returned for trial. RX 14; Senate 218 (Holmes); Senate 278-80 (Holmes).

68. On January 12, 1982, Drew Fairchild pled guilty to the single state charge of conspiracy to smuggle drugs, based on an oral agreement between Bill Porter and Bud Holmes; under the agreement, Drew Fairchild agreed to testify against

the pilot Watkins when he was returned to Mississippi, and Mr. Holmes would recommend that Drew Fairchild be sentenced to five years' probation and a $5,000 fine. HX 17; Senate 218-20 (Holmes).

69. Agents of the Mississippi Bureau of Narcotics have stated that Mr. Holmes did not need Drew Fairchild's testimony against the pilot Watkins, because the other conspirators, such as Charles Malone, were fully cooperating witnesses. RX 20, p. 2 (FBI memorandum of interview).

70. On March 19, 1982, June 25, 1982, and July 12, 1982, the sentencing of Drew Fairchild was continued by the Forrest County Circuit Court, because Drew Fairchild had to undergo and recuperate from back surgery. HX 18; House 257, 307 (Holmes); Senate 153 (W. Fairchild); Trial 119 (D. Fairchild); Trial 851-58, 861-62 (Holmes).

71. The pilot Watkins was apprehended in Florida in late 1982, and Mississippi promptly began proceedings to extradite him. RX 14; HX 42, p. 7 (Stipulation No. 59).

72. On November 15, 1982, the Forrest County Circuit Court entered another continuance of the sentencing of Drew Fairchild, and cited as a reason that the fugitive pilot, Watkins, "has been apprehended in the State of Florida," and "the State of Mississippi expects to extradite him in the foreseeable future." HX 18.

73. In December 1982, Bill Porter complained to Bud Holmes that after the first of the year a new judge would

take office for the Forrest County Circuit Court, Richard McKenzie. Porter expressed concern that Judge McKenzie, who had just been elected, would not respect the plea agreement for Drew Fairchild. Senate 285 (Holmes); House 312 (Holmes); Trial 754 (Holmes); RX 46, p. 30 (Holmes grand jury testimony, Feb. 21, 1985); RX 55, p. 46 (Holmes grand jury testimony, June 28, 1985); RX 54, p. 6 (FBI memorandum); RX 65 (transcript of Holmes' testimony in Matison v. White, 1987).

74. In response to Mr. Porter's entreaties, Bud Holmes moved for an order passing Drew Fairchild's case to the inactive files, and Circuit Judge Jack Weldy signed such an order on December 23, 1982. Mr. Porter's demands were a significant factor in Holmes' decision to file the motion to pass the case to the files. HX 19; House 312 (Holmes); Trial 754-55 (Holmes).

75. The draft order submitted by Mr. Holmes for passing the case to the files does not disclose the pending extradition proceedings to return the fugitive pilot, Watkins, and falsely states that the federal government was satisfied with Drew Fairchild's cooperation. Senate 216 (Holmes); RX 32, p. 47 (Holmes grand jury testimony, July 20, 1984); HX 42, p. 6 (Stipulation No. 54).

76. In January 1983, the local media sharply criticized Mr. Holmes for passing Drew Fairchild's case to the files,

and the matter became of focus of much controversy. RX 15; RX 16; RX 73; RX 28, p. 5 (FBI memorandum of interview).

77. After the fugitive pilot, Watkins, was returned to Mississippi in late January, Mr. Holmes promptly moved to return the Drew Fairchild case to the active docket, and the motion was granted. HX 20; Senate 289 (Holmes); Trial 755 (Holmes); HX 42, p. 8 (Stipulation No. 69).

78. Passing Drew Fairchild's case to the inactive files was a legally meaningless act which did not change the fact that Drew Fairchild had been convicted of a felony and did not impair the ability of the State of Mississippi to punish him for that felony. RX 62, pp. 1853, 1862 (Prosecutor Weingarten's closing statement at trial); Senate 284, 289, 354 (Holmes); Trial 924 (Holmes).

79. The state court prosecution of Drew Fairchild languished until early 1985, when Circuit Judge Richard McKenzie announced that he would not abide by the terms of the plea agreement reached by Bud Holmes and Bill Porter, and that he would consider sentencing Drew Fairchild to five years in prison. Post-Conviction 57 (Baltar); Post-Conviction 267-68 (Hess).

80. At that point, counsel for Drew Fairchild approached the federal prosecutors for assistance and asked that the federal government indict Drew Fairchild and thereby preempt the state court prosecution. Post-Conviction 268-69 (Hess).

81. Drew Fairchild made a plea bargain with the federal prosecutors in March 1985, in which he agreed to plead guilty to a single count of conspiracy to import drugs, and the prosecutors agreed to make no recommendation as to his sentence. Post-Conviction 269-70, 287-88 (Hess); Post-Conviction 440 (Weingarten).

82. Drew Fairchild was sentenced to six months in prison on the federal drug charges, and the federal sentence was accepted by the state of Mississippi as full satisfaction for the state drug charges pending against him. Trial 124-25 (D. Fairchild).

83. Neither Wiley nor Drew Fairchild benefited from the passing of Drew's case to the inactive files. Senate 341, 344 (Holmes).

V.

THE UNDERLYING EVENTS

The substantive events involved in this case occurred on a single day, although the date itself is disputed.

A. Wiley Fairchild Tells Judge Nixon He's Being Blackmailed

84. Judge Nixon dropped by Wiley Fairchild's office in the afternoon as a courtesy call, since Mr. Fairchild had asked him to keep in touch and Judge Nixon had just paid off the last two of the three notes. Senate 528-29, 681 (Nixon).

85. Judge Nixon was greeted by Wiley and Rodney Fairchild, Wiley's brother. RX 77; Trial 1532-33 (Nixon).

86. Wiley Fairchild asked his brother Rodney to leave the room while he talked to Judge Nixon. Senate 530 (Nixon); RX 77.

87. Wiley Fairchild told Judge Nixon that he was upset about all of the publicity over Drew's case, that he was being blackmailed by having the good Fairchild name dragged through the media, Bud Holmes was blackmailing him and that Carroll Ingram might be in on the blackmailing too. Senate 123, 127, 143, 183 (W. Fairchild); House 208-09 (W. Fairchild); RX 41A, p. 17 (W. Fairchild grand jury transcript, Nov. 28, 1984); Trial 481-84 (W. Fairchild); Senate 530, 570-71, 576 (Nixon); Trial 1532-35 (Nixon); House 434 (Nixon); RX 77 (Affidavit of Rodney Fairchild).

88. The publicity about passing Drew's case to the inactive files bothered Wiley Fairchild a great deal because it suggested that Wiley Fairchild himself might have been involved in wrongdoing in trying to get special treatment for his son. Senate 138, 139 (W. Fairchild).

89. Wiley Fairchild spoke to Judge Nixon about the blackmail because Mr. Fairchild wanted to stop the pressure on himself, not in order to help Drew. House 208 (W. Fairchild); Senate 158 (W. Fairchild).

90. Wiley Fairchild was not interested in helping Drew, but only in clearing up the Fairchild name. Senate 181 (W. Fairchild).

91. Wiley Fairchild did not tell Judge Nixon that he wanted any breaks for his son, Drew, and was not complaining to Judge Nixon because he wanted any special treatment for Drew. Trial 640-41 (W. Fairchild); House 208 (W. Fairchild);

92. Wiley Fairchild told Judge Nixon that if Mr. Holmes prosecuted Bob Royals like he was prosecuting Drew, Mr. Fairchild would not complain at all. Senate 138, 195 (W. Fairchild).

93. Wiley Fairchild did not ask Judge Nixon to put in a good word for Drew. Senate 144 (W. Fairchild); House 192, 210 (W. Fairchild).

94. Wiley Fairchild wanted Bud Holmes to live up to the terms of the plea bargain he had made with Drew Fairchild. Trial 483-84, 651, 652 (W. Fairchild); Senate 144 (W. Fairchild).

95. Wiley Fairchild did not ask Judge Nixon to do anything. Trial 640-41, 643 (W. Fairchild); Senate 144 (W. Fairchild); House 209 (W. Fairchild); Trial 1535 (Nixon); House 434 (Nixon); Senate 570, 573 (Nixon).

96. Wiley Fairchild was not attempting to get special treatment for Drew or a lighter sentence or no sentence. Senate 138, 197 (W. Fairchild).

97. Wiley Fairchild spoke to Judge Nixon about the blackmailing allegation because friends help friends. Senate 121 (W. Fairchild); House 177 (W. Fairchild).

98. Judge Nixon was taken aback by Wiley Fairchild's statements about blackmail and said little or nothing. Senate 531, 591 (Nixon); Senate 123 (W. Fairchild); Trial 484 (W. Fairchild); House 178 (W. Fairchild).

99. Judge Nixon did not exactly know what Mr. Fairchild meant by "blackmail," and did not think dragging the Fairchild name through the media was blackmail. Senate 532, 591 (Nixon).

100. Judge Nixon did not think Carroll Ingram or Bud Holmes would be involved in blackmail, and thought there must be a misunderstanding on the matter by Mr. Fairchild. Senate 540, 591 (Nixon); House 434, 436-37 (Nixon); Trial 1534-35 (Nixon).

B. At Bud Holmes' Farm

101. Judge Nixon had previously arranged to drive to Bud Holmes' farm in the late afternoon, to borrow some Hank Williams records from Mr. Holmes. Judge Nixon drove by himself to the farm around 5 p.m. and met Mr. Holmes. Senate 534-35, 711-12 (Nixon); House 435 (Nixon); Trial 1536 (Nixon).

102. Judge Nixon and Mr. Holmes had a drink and began listening to the Hank Williams records while Mr. Holmes received and placed several telephone calls. Senate 535 (Nixon); House 435 (Nixon); Trial 1537 (Nixon).

103. Judge Nixon had not intended to relate Mr. Fairchild's blackmail allegation to Mr. Holmes, but it

was weighing on him so he told Mr. Holmes about it. Senate 536, 572 (Nixon); Trial 1538 (Nixon).

104. Judge Nixon related Mr. Fairchild's blackmail complaint to Bud Holmes for Mr. Holmes' benefit. Senate 574 (Nixon).

105. Mr. Holmes responded that Mr. Fairchild is paranoid. Senate 536 (Nixon); Trial 1539 (Nixon).

106. Mr. Holmes told Judge Nixon that there was a plea deal worked out in Drew Fairchild's case; this was the first time Judge Nixon heard that Drew Fairchild had a plea agreement. Senate 256-57, 349 (Holmes); Senate 539 (Nixon); Trial 1539 (Nixon).

107. Mr. Holmes offered to tell Judge Nixon about the case, but Judge Nixon said he did not want to hear about it. Senate 536, 578, 645, 716 (Nixon); House 437 (Nixon); Senate 226-27, 255-56, 330, 343 (Holmes); House 247, 305 (Holmes).

108. Bud Holmes has testified that Judge Nixon did not ask him to do anything in connection with the Drew Fairchild case, and made that point clear. Senate 223, 228, 255, 258, 327-28, 332, 356 (Holmes).

109. The conversation between Bud Holmes and Judge Nixon that later was referred to in the phone call to Wiley Fairchild lasted only a few minutes. Senate 258 (Holmes); House 305 (Holmes).

C. Phone Call From Bud Holmes' Farm To Wiley Fairchild

110. Wiley Fairchild received a phone call from Bud Holmes' farm in the early evening of the same day, after he had had the equivalent of six drinks of whisky, his dinner, and gone to bed. He was drifting off to sleep when the call came in. Trial 636 (W. Fairchild); House 179 (W. Fairchild); Senate 145, 186 (W. Fairchild).

111. Judge Nixon was listening to the Hank Williams records when Mr. Holmes called him over to the telephone, handed him the phone and said, "talk to Wiley Fairchild." Judge Nixon had not known Mr. Holmes was speaking with Wiley Fairchild. Senate 537-38 (Nixon); Trial 1541 (Nixon).

112. Mr. Fairchild told Judge Nixon that he was glad Judge Nixon had "mentioned that matter to that fellow. I'm satisfied." Judge Nixon said something like, "Well, that's good. I'm glad it's resolved." Senate 537-38 (Nixon); Trial 1541 (Nixon).

113. Based on the telephone conversation that evening, Wiley Fairchild concluded that the blackmail problem had been resolved and would no longer bother him. Senate 146 (W. Fairchild); House 210 (W. Fairchild). Judge Nixon reached the same conclusion. Senate 539-40, 575 (Nixon).

114. Based on the telephone conversation that evening, Wiley Fairchild concluded that Bud Holmes would live up to the plea agreement he had made with Drew Fairchild. House 180 (W. Fairchild).

115. Wiley Fairchild does not recall Bud Holmes mentioning during the phone call that he could pass Drew's case to the files. RX 41A, p. 29 (W. Fairchild grand jury transcript); Senate 147, 185 (W. Fairchild); House 180, 210 (W. Fairchild).

116. The first time Wiley Fairchild even knew there was such a procedure as passing a case to the inactive files was when Drew Fairchild's case already had been passed to the inactive files. Senate 136 (W. Fairchild); House 195 (W. Fairchild).

117. Wiley Fairchild does not recall Judge Nixon saying during the phone call that he was grateful for the opportunity with invest with Mr. Fairchild because of all the education expenses he had to carry with his children. Senate 147 (W. Fairchild); House 179, 210 (W. Fairchild).

118. Nothing wrong happened during any conversations among Judge Nixon, Wiley Fairchild and Bud Holmes that day. Senate 301, 318 (Holmes); Trial 804 (Holmes); Senate 410-11, 419 (Ingram); Senate 540, 552-53 (Nixon); RX 68A (Opinion letter of Prof. Geoffrey Hazard).

119. Judge Nixon never asked anyone to do anything about Drew's case, and did not influence anyone concerning the case. Senate 715, 722 (Nixon); Senate 228 (Holmes); RX 63, pp. 11-13 (tape-recorded conversation with Bud Holmes).

120. After the phone call, Judge Nixon did not think again about the matter because he thought it was a

misunderstanding that had been resolved. Senate 540, 575 (Nixon).

121. Bud Holmes understood that the phone call to Wiley Fairchild from his farm was placed for the purpose of informing Wiley Fairchild that Drew Fairchild had a preexisting plea bargain that would not require any jail time. Senate 227, 231-32, 259 (Holmes); Trial 739 (Holmes); House 246 (Holmes).

122. Mr. Holmes does not know whether Judge Nixon overheard Mr. Holmes' remarks to Wiley Fairchild on the telephone call that evening. Senate 261 (Holmes).

123. Mr. Holmes testified that, after the phone call to Wiley Fairchild had been made, Judge Nixon had no reason to believe that the prosecution of Drew Fairchild would be changed from the plea agreement that had been reached previously in the case. According to Mr. Holmes, it was reasonable for Judge Nixon to conclude that Drew Fairchild's preexisting plea agreement would be implemented. Senate 262 (Holmes).

124. Bud Holmes testified that even after the phone call to Wiley Fairchild from his farm, Mr. Holmes' intention was to get the fugitive Watkins back into custody, have Drew Fairchild testify against Watkins, and have Drew Fairchild sentenced as provided in his plea agreement. Senate 234, 237, 284 (Holmes); House 253 (Holmes).

125. Mr. Holmes did not think Judge Nixon was trying to get him to do anything in connection with the Drew Fairchild case. House 280, 292, 306 (Holmes); RX 63, p. 10 (transcript of tape-recorded conversation of Bud Holmes); RX 64, p. 15 (transcript of tape-recorded conversation of Bud Holmes); RX 76, pp. 3-4 (stipulated testimony of James Halsted explaining RX 63 and RX 64).

126. Neither Wiley Fairchild nor Bud Holmes was sober at the time of the phone call. RX 56, p. 1 (Transcript of tape-recorded conversation of Bud Holmes); Senate 356 (Holmes; Senate 145, 186 (W. Fairchild).

D. Carroll Ingram Hears About The Phone Call

127. Wiley Fairchild told Carroll Ingram over the telephone that Judge Nixon had spoken to Bud Holmes about something concerning Drew Fairchild's case, and Mr. Fairchild was happy about it. Senate 377 (Ingram).

128. Mr. Ingram later spoke to Judge Nixon on the telephone concerning another matter, and Judge Nixon mentioned in passing that he had talked to Bud Holmes concerning Drew's case. Judge Nixon did not explain Wiley Fairchild's concerns or what he said to Bud Holmes. Senate 378-80, 409-10 (Ingram); Senate 541-42 (Nixon).

129. Based on these two references, Mr. Ingram assumed that Drew Fairchild's plea agreement would be honored, and did not relate either conversation to Drew Fairchild's case being passed to the files. Senate 380 (Ingram).

E. The Key Issue At The Jury Trial: The Date Of The Phone Call

130. In his closing argument to the jury at the trial, Prosecutor Weingarten "staked his case on the fact [that the phone call from Bud Holmes' farm to Wiley Fairchild] went before" Drew's case was passed to the inactive files. RX 62, p. 1974.

131. When Wiley Fairchild spoke with Judge Nixon about his blackmail suspicions, Mr. Fairchild was terribly upset about publicity concerning Drew Fairchild's case. House 177 (W. Fairchild); Trial 483, 529 (W. Fairchild).

132. The only publicity in the Hattiesburg American and the Jackson Clarion-Ledger for 1980 through April 1983, concerning Drew Fairchild's case occurred in August 1981, January 1982, and January 1983. RX 76, pp. 1-2. The only television coverage of Drew Fairchild's case in the record occurred in January 1983, after the case was passed to the inactive files. RX 73.

133. There was no controversy or publicity about Drew Fairchild's case throughout 1982. Trial 629 (W. Fairchild); Senate 152-53 (W. Fairchild); Senate 281 (Holmes); House 257 (Holmes).

134. The heavy and adverse publicity about Drew Fairchild's case came in January 1983, after the case had been passed to the inactive files. Senate 240, 283, 340 (Holmes); RX 28, p. 5 (FBI Memorandum of interview).

135. Wiley Fairchild's brother, Rodney, who was present at the beginning of the meeting between Judge Nixon and Wiley Fairchild that day, recalls that the meeting occurred at the time of the publicity over Drew Fairchild's case being passed to the files. RX 77.

136. Carroll Ingram, who learned about the phone call afterwards from Wiley Fairchild, believes the phone call occurred in late 1982, but thinks it also could have happened within three or four months of that time, in either direction. Senate 375, 378 (Ingram); House 401-03, 412 (Ingram); Trial 1150 (Ingram).

137. When Wiley Fairchild first described the phone call in 1984, he did not say it occurred before Drew Fairchild's case was passed to the files in December 1982. Post-Conviction 37-39 (Baltar).

138. Wiley Fairchild has testified that the phone call occurred after Drew's case was passed to the files in December 1982. Trial 655, 659 (W. Fairchild); Post-Conviction 201-02; 214 (W. Fairchild). He also has testified that the phone call occurred before Drew's case was passed to the files. Senate 125 (W. Fairchild).

1. March 11, 1983

139. On March 11, 1983, Judge Nixon was trying a criminal bank robbery case in Hattiesburg involving Douglas "Chico" Patterson. Senate 528 (Nixon); House 433 (Nixon); Trial 1528-29 (Nixon).

140. At approximately 12:10 p.m. on March 11, Judge Nixon received a telephone call from Bud Holmes, who left the message that he would "wait in his office" for Judge Nixon's call. RX 17.

141. At the time of his meeting with Wiley Fairchild and the phone call from Bud Holmes' farm, Judge Nixon's wife, Barbara, was recovering from periodontal surgery which occurred in late February 1983. Senate 529 (Nixon).

142. Judge Nixon also had just finished paying off the loan for the oil transaction and wanted to pay his respects to Mr. Fairchild. Senate 528-29 (Nixon); HX 6 (two notes marked "paid" as of March 7, 1983).

143. Wiley Fairchild told Judge Nixon that he thought Carroll Ingram might be part of Bud Holmes' "blackmailing" effort in connection with the Drew Fairchild case. Senate 123 (W. Fairchild).

144. Carroll Ingram's only connection with that case occurred in late December 1982, when he delivered to Wiley Fairchild the order passing Drew Fairchild's case to the inactive files, and Mr. Fairchild became "suspicious" of Carroll Ingram when he delivered that order. Trial 634, 638 (W. Fairchild); Senate 126, 137 (W. Fairchild).

145. Wiley Fairchild had no basis for suspecting that Carroll Ingram might be involved in the blackmailing until Mr. Ingram brought him the order passing Drew Fairchild's

case to the files in late December 1982. Senate 154 (W. Fairchild).

146. Judge Nixon recalls that he read about Drew Fairchild's case in the newspaper shortly before the blackmail conversation with Wiley Fairchild. Senate 528 (Nixon).

147. Judge Nixon visited Bud Holmes at Mr. Holmes' farm in March 1983 to borrow some Hank Williams, Sr. records. Senate 532-33 (Nixon). Mr. Holmes agrees that Judge Nixon came to his farm on an occasion to borrow Hank Williams records, but does not recall if that was when the phone call occurred. Senate 294, 295 (Holmes); Trial 917-18 (Holmes).

148. When Bud Holmes first testified before the grand jury about the phone call to Wiley Fairchild from his farm, he stated that the phone call occurred in the spring of 1982 or the spring of 1983. This testimony was given before Mr. Holmes made his plea bargain. RX 46, p. 53 (Holmes grand jury testimony, Feb. 21, 1985).

2. The Prosecution Case: December 1, 1982 or May 14, 1982

149. Wiley Fairchild testified about the phone call on five occasions between 1984 and 1988 -- twice to the grand jury, once at Judge Nixon's trial, once at the post-conviction hearing in Jackson, Mississippi in August 1988, and once before the Subcommittee on Civil and Constitutional Rights and Liberties of the House Judiciary Committee. On

none of those five occasions did Wiley Fairchild testify that the phone call from Bud Holmes' farm was associated with the date of December 1, 1982. His testimony that the phone call occurred close to December 1, 1982 was given for the first time during the Senate trial, almost seven years after the event. Senate 122, 148-49 (W. Fairchild).

150. Wiley Fairchild has testified that he does not remember things as well now as he did in the early 1980s. Senate 110 (W. Fairchild).

151. In the Senate trial, Mr. Fairchild testified for the first time ever that he called Judge Nixon's chambers on December 1, 1982, to ask the judge to come see him. Senate 122, 148-49 (W. Fairchild).

152. On December 1, 1982, Judge Nixon was not in his chambers, but was on a quail hunt. RX 78.

153. On December 1, 1982, Judge Nixon's secretary, Betty Lou Watkins, was assembling financial information to provide to Judge Nixon's new accountant, since his previous accountant had just died. RX 79 (Declaration of Betty Lou Watkins).

154. Ms. Watkins occasionally spoke on the telephone with Fairchild Construction employees concerning administrative matters relating to payment of royalties to Judge Nixon and repayment of the loans to Fairchild Construction. Senate 149-50 (W. Fairchild); RX 72 (Sept. 16,

1982, record of interest calculation by Skip Jarvis, given to Betty Lou Watkins over the telephone); RX 79.

155. The telephone record reflecting a call from Fairchild Construction Co. to Judge Nixon's chambers on December 1, 1982 (HX 40) was made on the company's regular business lines, to which many Fairchild office employees had access, so the call could have been made by any of a number of individuals. Senate 149 (W. Fairchild).

156. Ms. Watkins firmly believes that the telephone call to Judge Nixon's chambers reflected in HX 40 was a call placed to her in connection with her efforts to assemble financial information for Judge Nixon's new accountant. RX 79.

157. Judge Nixon's telephone messages for December 1, 1982 do not include any message for Judge Nixon from Fairchild Construction or from Wiley Fairchild. RX 79.

158. Wiley Fairchild also associates the conversation with Judge Nixon as having happened a few days after he was visited by Bob Royals, after Mr. Royals had visited Joe Krohn at the Federal Prison Camp at Maxwell Air Force Base in Montgomery, Alabama. RX 35, p. 8 (proffer of W. Fairchild testimony); Trial 480-81 (W. Fairchild); House 177, 206-07 (W. Fairchild); Senate 150 (W. Fairchild); RX 41A, pp. 14-17 (W. Fairchild grand jury testimony, Nov. 28, 1984).

159. Joe Krohn was transferred out of the facility at Maxwell Air Force Base in Montgomery on June 22, 1982, making

it impossible for Bob Royals to have visited Mr. Krohn at that facility close to the time of December 1. RX 44, p. 3.

160. Drew Fairchild remembers Bob Royals coming to him in the summer of 1981, before Drew was indicted, and saying that Mr. Royals and Bill Porter had just gotten back from Montgomery, Alabama. Mr. Royals told Drew Fairchild that Bill Porter had said that Drew would be indicted unless Drew paid Mr. Porter's fee of $10,000. RX 28, p. 4 (FBI memorandum of interview); RX 42, p. 2 (FBI memorandum of interview).

161. Bud Holmes recalls that the phone call to Wiley Fairchild from his farm occurred at about 7 p.m., a little after sunset. In early December, sunset is much earlier, at 5 p.m. Senate 254, 291 (Holmes).

162. Wiley Fairchild testified before the Senate that he could have the date of the phone call wrong. Senate 152 (W. Fairchild).

163. Bud Holmes claims that the phone call occurred on the afternoon of May 14, 1982, Senate 239, 262 (Holmes), but he agrees that it could have been another date and will not argue over whether it happened in 1982 or 1983. Senate 292, 293 (Holmes); Trial 875 (Holmes).

164. Four other witnesses (Rodney Fairchild, Wiley Fairchild, Judge Nixon, and Carroll Ingram) have attempted to date the phone call and none has placed it in spring of 1982.

165. Mr. Holmes chose the May 14 date by looking back at his office calendar and deciding that May 14 was the date, although his office calendar shows no meeting with Judge Nixon on May 14, 1982. Trial 736-37, 750 (Holmes); HX 21.

166. Bud Holmes associates the phone call with turkey hunting season, which in Mississippi is always in the spring. Senate 290 (Holmes); Trial 736-39 (Holmes); House 244 (Holmes).

167. During a tape-recorded conversation in 1985, Bud Holmes stated that the phone call occurred a year after the January 1982 plea agreement with Drew Fairchild, or in 1983. RX 56, pp. 1, 12-13.

168. Judge Nixon was in Hattiesburg on May 14, 1982, but he is in Hattiesburg 20 or 30 days a year. Senate 542-43, 648 (Nixon).

169. Judge Nixon did not have the blackmail conversations on May 14, 1982. Senate 707 (Nixon).

IV.

THE FEDERAL INVESTIGATION

A. The Jarvis Connection

170. The federal investigation was triggered by anonymous telephone calls placed beginning in November 1983, by Robert "Skip" Jarvis, a relative by marriage of Wiley Fairchild and an employee of Fairchild Construction. Senate 39, 63 (White-Spunner); Trial 275-76; 299 (Jarvis).

171. Although Jarvis had no evidence that Judge Nixon had done anything wrong, RX 62, p. 1837 (Weingarten), he told the FBI in the anonymous telephone calls that Judge Nixon had been paid off to shut down the Drew Fairchild case on the federal level. RX 18, p. 16 (transcript of anonymous telephone call between FBI and Jarvis on November 10, 1983); Senate 63-64 (White-Spunner).

172. Jarvis, who was trying to drive Wiley Fairchild out of the family business, became convinced that Wiley Fairchild was trying to kill him. Trial 409-10 (Jarvis); Senate 64 (White-Spunner); House 147 (W. Fairchild); RX 53.

173. The FBI worked closely with Skip Jarvis during the investigation. Senate 64 (White-Spunner).

174. Following the indictment and convictions of Wiley Fairchild, Drew Fairchild, Robert Royals and Bud Holmes, Jarvis sent a letter to Agent White-Spunner stating, "four down," and "I'm eager to go after the big prize." RX 53; Senate 68 (White-Spunner).

175. The FBI understood that Jarvis' initial allegation was that Judge Nixon had steered Drew Fairchild's case away from federal prosecutors and into Bud Holmes' hands. The FBI was trying to answer questions such as how did the federal prosecution get shut down, and how did the Drew Fairchild case end up in Mr. Holmes' hands? Senate 69 (White-Spunner); RX 21, pp. 28-29 (transcript of FBI-Jarvis telephone call of Feb. 6, 1984).

176. When the FBI interviewed Wiley Fairchild for the first time in early April 1984, they told Mr. Fairchild that one of the "crucial questions" that they were investigating was how the Drew Fairchild case was transferred from federal hands to state prosecutor Bud Holmes. RX 22 (FBI memorandum of interview with Wiley Fairchild, April 10, 1984); Senate 76 (White-Spunner).

B. Wiley Fairchild's Blackmail Allegation

177. In early April 1984, Wiley Fairchild became suspicious again that Bud Holmes was trying to blackmail him, and decided to report the matter to the FBI. He sent his assistant, John Baltar, to the FBI with the blackmail report. Senate 129 (W. Fairchild); RX 22 (FBI memorandum of April 10, 1984 interview with Wiley Fairchild).

178. When the FBI first responded to Wiley Fairchild's blackmail report in early April 1984, Mr. Fairchild described his blackmail suspicions to them at some length. RX 22; Senate 77-79 (White-Spunner); Senate 129 (W. Fairchild).

179. In pursuing their investigation, the FBI wired Skip Jarvis with a secret recording device and sent him to record conversations with Wiley Fairchild on April 18, 1984. RX 25 and 26.

180. During one of those tape-recorded conversations, Wiley Fairchild told Jarvis at six separate points that he was being blackmailed. RX 25, pp. 5, 6, 10, 18-19.

181. Wiley Fairchild had "blackmail on the brain." Senate 82, 83 (White-Spunner); Trial 480, 484, 681 (W. Fairchild).

182. During cross-examination, Wiley Fairchild identified a number of specific events which prompted or reinforced his conclusion that he was being blackmailed by Bud Holmes (Senate 129-43; RX 81):

(i) The visit from Bob Royals during which Mr. Royals stated that Bill Porter had said that Wiley Fairchild should get up off his money to help Drew, Senate 134 (W. Fairchild);

(ii) The fact that Bob Royals was not prosecuted by Bud Holmes, Senate 129 (W. Fairchild);

(iii) The unexpected state-court indictment of Drew Fairchild, Senate 134 (W. Fairchild);

(iv) Bud Holmes' calling him to tell him that Drew had been indicted in state court, Senate 132 (W. Fairchild); House 151 (W. Fairchild);

(v) The return of Drew Fairchild's case to the active files after it was been put on the inactive docket, Senate 140 (W. Fairchild);

(vi) In December 1983, Bud Holmes and Judge McKenzie visited Mr. Fairchild in his office early in the morning to talk about Drew Fairchild's case. Senate 141-42 (W. Fairchild).

183. The interview with Judge Nixon by the investigators on April 19, 1984 occurred nine days after Wiley Fairchild expressed his blackmail allegations to the FBI, and one day after he repeatedly expressed them again to Skip Jarvis during the tape-recorded conversation. RX 22; RX 25; HX 1.

C. Interview of April 19, 1984

184. On April 19, 1984, FBI Special Agent-in-Charge Weldon Kennedy called Judge Nixon to ask that he meet that day with Special Agent Kenneth White-Spunner and prosecutor Reid Weingarten. Senate 41 (White-Spunner); Senate 544 (Nixon).

185. Judge Nixon agreed to have the interview tape-recorded by the FBI. Senate 42 (White-Spunner); Senate 544 (Nixon).

186. Before the tape-recorder was turned on, Prosecutor Weingarten told Judge Nixon they were investigating the oil and gas transaction and the handling of the Drew Fairchild case at the federal level. Senate 544, 595-96 (Nixon).

187. Judge Nixon had not known until that moment that Drew Fairchild's case ever had been in federal hands and, as a federal official, he was interested in that information.

Senate 545 (Nixon). He did not think the investigation concerned the state's handling of Drew Fairchild's case. Senate 599 (Nixon).

188. Judge Nixon volunteered that he had purchased three oil interests from Wiley Fairchild, and paid $9,500 for them. HX 1, pp. 1, 4, 8.

189. Judge Nixon volunteered that two of the oil interests turned out profitably for him, (HX 1, p. 2), and that Wiley Fairchild at one point suggested they might enter another transaction, although no later transaction ever developed. HX 1, p. 25; Senate 86 (White-Spunner).

190. Judge Nixon told the investigators that Wiley Fairchild is a difficult man to understand at times, and "talks sometimes in riddles." HX 1, p. 4.

191. Judge Nixon volunteered to the investigators that he purchased the oil interests with borrowed money. HX 1, p. 5.

192. Judge Nixon volunteered at two points that there was something about the transaction that was "somewhat unorthodox." HX 1, pp. 6, 9 That is the sort of comment that catches an investigator's attention. Senate 85-86 (White-Spunner).

193. The investigators questioned him closely about the time when the transaction was actually consummated between Judge Nixon and Wiley Fairchild, expressing concern that the transaction had not occurred at the time reflected on the

documents, (HX 1, pp. 6, 8-12, 23-24, 26, 34-36), and suggesting that the documents had been backdated to conceal a connection between the investment and Drew Fairchild's case. HX 1, pp. 18-19, 36-39, 48-50.

194. The investigators told Judge Nixon that the transfer of the Drew Fairchild case from federal hands to state prosecutor Paul "Bud" Holmes was "what we're looking at here." HX 1, pp. 28-29, 32, 42-46. Judge Nixon expressed ignorance of that transfer from federal to state authorities, and expressed great interest in movement of the case from the U.S. Attorney's office to state prosecutor Holmes. HX 1, pp. 28, 32, 43-44; Senate 89, 91 (White-Spunner); Senate 545 (Nixon).

195. Judge Nixon had no prior notice of the interview, and thus had no time to review the matters at issue. HX 1, p. 41; Senate 92 (White-Spunner); Senate 601-02, 626 (Nixon).

196. Towards the end of the interview, Judge Nixon stated that "as a United States District Judge" he could have done nothing to influence Drew Fairchild's case. HX 1, pp. 47-48.

197. During the interview, Judge Nixon was never asked about Wiley Fairchild's blackmail allegations. Agent White-Spunner could not remember if the interviewers intentionally or inadvertently failed to ask Judge Nixon about Wiley Fairchild's blackmail allegations. Senate 84, 101-03 (White-Spunner).

198. Judge Nixon was not reminded of the blackmail conversations during the interview, although they were somewhere in his mind. He answered every question as truthfully as he could. Senate 546, 716-17 (Nixon); Trial 1709 (Nixon); House 443, 506 (Nixon).

199. Judge Nixon was never indicted for any statement made during the interview. HX 28; Senate 63 (White-Spunner).

D. After the Interview

200. Judge Nixon told the prosecutor at the end of the interview that he intended to call Carroll Ingram, Bud Holmes and U.S. Attorney George Phillips to ask them what was going on. Trial 1713 (Weingarten); Senate 547 (Nixon); House 446 (Nixon).

201. Judge Nixon so informed the prosecutor of his intention to call Messrs. Ingram, Holmes and Phillips because he did not want the prosecutor to think that Judge Nixon was trying to influence anyone. Senate 547 (Nixon).

202. When Judge Nixon called Carroll Ingram, Bud Holmes, and George Phillips he was upset about the interview, and said he had no idea what the investigation was about. Senate 241-42 (Holmes); Senate 382, 436 (Ingram); Trial 223-24 (Phillips). None of the three men he called provided any further information about the investigation. Senate 547 (Nixon).

203. During the telephone conversation with Judge Nixon following the April 19 interview by the FBI, Mr. Holmes did

not remind Judge Nixon of the phone call from his farm to Wiley Fairchild. Senate 300, 333-34 (Holmes); Senate 653 (Nixon); Trial 759 (Holmes).

204. When Judge Nixon called Mr. Holmes after being interviewed by the FBI in April 1984, Judge Nixon told Mr. Holmes that the government was investigating the oil properties he had bought from Wiley Fairchild and the transfer of Drew Fairchild's case from federal court to state court. Senate 299 (Holmes); Trial 952-53 (Holmes).

205. In that phone call after the April interview, Judge Nixon also told Mr. Holmes that if he had thought the oil properties had anything to do with Drew Fairchild's case, he would not have purchased the oil properties. Trial 758-59 (Holmes).

206. Between the time of the interview on April 19 and his grand jury appearance on July 18, Judge Nixon had no other conversation with Carroll Ingram or Wiley Fairchild concerning the investigation. Senate 540 (Nixon); Senate 391 (Ingram).

207. Also during that same period, Judge Nixon had no conversation with Bud Holmes concerning the investigation, and never asked Mr. Holmes to find out whether Wiley Fairchild taped phone calls to his home. Senate 540, 548 (Nixon).

208. Before Judge Nixon appeared before the grand jury, there were extensive leaks to the press of the investigation,

and the media coverage of the investigation was sensationalistic and pointed at Judge Nixon. Senate 548 (Nixon); Senate 303 (Holmes); Trial 811-12 (Holmes); Senate 93-94 (White-Spunner).

209. The leaks of secret grand jury information got so bad that the District Judge presiding over the grand jury entered a "gag" order directing the federal government to stop leaking its investigation to the press. RX 74; Senate 93 (White-Spunner); House 449-50 (Nixon). Judge Parker's "gag" order noted that although the order "may be somewhat tardy, the court is determined that there be no repetition of 'leaks' regarding the works of this grand jury." RX 74.

E. Grand Jury Testimony: July 18, 1984

210. Judge Nixon volunteered to testify before the grand jury; he was not subpoenaed. Senate 549, 659, 681 (Nixon); HX 42, p. 9 (Stipulation No. 79).

211. Judge Nixon wanted to testify to clear up all the publicity about the investigation that had been devastating to his family. Senate 548-49 (Nixon).

212. When Judge Nixon appeared before the grand jury, he was outraged and upset and wanted to set the record straight. Senate 549 (Nixon).

213. The first 44 pages of the transcript of Judge Nixon's grand jury testimony relate solely to the oil interests which he purchased from Wiley Fairchild, the date

of that transaction and the documents related to the transaction. HX 2, pp. 1-44.

214. When Judge Nixon told the grand jury that he did not recall Bud Holmes "discussing" the Drew Fairchild case with him, Judge Nixon immediately explained that the federal government could not interfere with a state court prosecution, reflecting Judge Nixon's understanding that the investigation focused on actions by the federal government that might be attributed to a federal official like Judge Nixon. HX 2, pp. 48-49; House 467-69 (Nixon); Senate 677-78 (Nixon). Judge Nixon then returned to that subject at length in order "to explain my answer" concerning "the authority of a federal judge." HX 2, pp. 51-52.

215. Judge Nixon was focused on the treatment of Drew Fairchild's case at the federal level because he could be accused of misconduct only for interfering with a federal matter. Senate 665 (Nixon).

216. When he was questioned about meetings he had with Wiley Fairchild after the oil deeds were executed in February of 1981, Judge Nixon said he could not describe any such meetings "one way or the other," that they spanned three or four years and he was trying to reconstruct events in the past, and he "can't say for sure" what any subsequent meetings were for. HX 2, pp. 54-56.

217. Judge Nixon volunteered that Wiley Fairchild had mentioned to him the possibility that Mr. Fairchild would sell him another oil interest "with the name School in the property," but nothing ever came of that. (HX 2, p. 56)

218. The prosecutor then questioned Judge Nixon concerning the dates of the oil transaction again at the end of his grand jury testimony, (HX 2, pp. 57-65), and again the prosecutor implied through his questions that the date on the documents had been manipulated to conceal some connection between the oil transaction and the Drew Fairchild case. HX 2, pp. 65-71.

219. At the end of his grand jury appearance, Judge Nixon invited questions from the grand jurors about the Drew Fairchild case, and said he would be glad to answer any such questions. HX 2, p. 79.

220. Judge Nixon also told the grand jurors that the only "possible charge" of a federal crime that he thought was involved in the investigation concerned the Drew Fairchild case, and that since he had no involvement with that matter while it was at the federal level, "I had nothing to do with that." HX 2, p. 96; House 452-53 (Nixon).

221. Judge Nixon told the grand jury that he had recused himself from hearing a civil case that had involved the oil interests he had purchased from Wiley Fairchild, and also involved the interests of Mr. Fairchild. HX 2, pp. 89-90. That case was Transcontinental Gas Pipe Line Corp. v.

Mississippi State Oil & Gas Board, No. J82-0531 (S.D. Miss.), and Judge Nixon recused himself from the case in October 1982, immediately after being assigned to it. RX 12; Senate 704 (Nixon).

222. Judge Nixon was asked no questions before the grand jury concerning the possible blackmailing of Wiley Fairchild. HX 2.

223. Carroll Ingram testified before the grand jury on July 19, 1984, one day after Judge Nixon, and was asked three questions about possible blackmailing of Wiley Fairchild. Senate 398 (Ingram); RX 31, pp. 64-66 (Ingram grand jury testimony, July 19, 1984).

224. The blackmailing conversations did not come to mind for Judge Nixon during his grand jury testimony, and he had not reconstructed those conversations before he testified, although they were somewhere in his recollection. Senate 550, 722 (Nixon); House 451 (Nixon).

225. Judge Nixon gave truthful answers to all questions he was asked before the grand jury. Senate 550 (Nixon).

226. Judge Nixon did not think of the blackmail conversations until Bud Holmes reminded him about them in February 1985. Senate 575 (Nixon).

227. In February 1985, Judge Nixon discussed with his counsel whether he should agree to go before the grand jury again to testify about the telephone call from Bud Holmes' farm to Wiley Fairchild. Because Judge Nixon clearly was the

target of the investigation, and because the phone call seemed so insignificant, they determined not to approach the government affirmatively on the matter. Senate 642, 658-59 (Nixon).

228. Judge Nixon never discussed his grand jury testimony with Bud Holmes. Trial 963 (Holmes).

F. Sandbagging the Other Witnesses Before the Grand Jury

229. Carroll Ingram and his lawyer met with the prosecutors the night before Mr. Ingram was scheduled to appear before the grand jury in July 1984. They asked the prosecutors for an opportunity to review any documents relating to the oil interests sold to Judge Nixon, but were not shown any such documents. Senate 394-95 (Ingram).

230. Towards the end of Mr. Ingram's grand jury testimony on July 20, 1984, the prosecutors showed him, for the first time, the first draft of the deeds involved in the oil interest that were sold to Judge Nixon. Senate 394-95.

231. Mr. Ingram felt that the prosecutors' questioning unfairly had surprised him and had not given him time to review the first-draft deeds, which he had not known about. Senate 396-98 (Ingram).

232. When Bud Holmes was subpoenaed to appear before the grand jury in July 1984, the prosecutors told him he would simply be asked to explain some continuances in the Drew Fairchild case. House 285, 292-93 (Holmes); Senate 291-92 (Holmes).

233. Mr. Holmes felt that he was sandbagged by the prosecutors' actual questioning before the grand jury, which covered many other subjects. Senate 340 (Holmes); House 285-86, 293, 324 (Holmes); RX 32 (Holmes grand jury testimony, July 20, 1984).

234. Eugene Lewis was a Florida attorney involved in the Petit Bois Island project. When he testified before the Hattiesburg grand jury, he was asked if he had ever seen certain documents, and Mr. Lewis replied that he did not think so. At that moment, the prosecutor had such documents in his possession with Mr. Lewis' signature on them. After being indicted for perjury for not remembering the documents the prosecutor had concealed from him, Mr. Lewis objected that he had been sandbagged before the grand jury. Mr. Lewis was acquitted. House Hearings, Ex. N-35, p. 3.

G. Bud Holmes Sweats the Grand Jury Investigation

235. When interviewed by the FBI in April 1984, Mr. Holmes falsely denied talking to Wiley Fairchild about Drew's case even though he and Judge McKenzie had visited Wiley Fairchild's office for the purpose of reviewing the case in December 1983, only five months earlier. That false statement was completely unrelated to Judge Nixon, who had no connection to the Holmes-McKenzie visit to Mr. Fairchild's office. RX 29 (FBI Memorandum of interview).

236. After his testimony before the grand jury in July, Holmes asked Karl Kepper if Wiley Fairchild had testified

about the phone call. Senate 306 (Holmes); RX 54, p. 7 (FBI memorandum); RX 47, pp. 7-8 (Karl Kepper grand jury testimony, March 27, 1985).

237. Also after his grand jury testimony in July, Mr. Holmes asked Carroll Ingram if he had been questioned about the phone call, and if Wiley Fairchild taped calls to his home. Senate 383, 384, 387 (Ingram).

238. Mr. Holmes was nervous about the investigation when he was subpoenaed to return to grand jury in February 1985, and when he then learned that Carroll Ingram had confirmed to the government that there had been a telephone call to Wiley Fairchild from Mr. Holmes' farm. Senate 308 (Holmes); Senate 388 (Ingram).

239. Mr. Holmes visited Mr. Ingram at his law office and told Mr. Ingram that Mr. Ingram had "made me out to be a perjurer." Mr. Holmes questioned Mr. Ingram strongly about whether his memory was accurate. Mr. Holmes saw Ingram on two occasions to make this point, and agrees that it was a stupid thing to do. Senate 309-10 (Holmes); Senate 389 (Ingram).

240. Although Mr. Ingram understood that Mr. Holmes wanted his recollection of the phone call to be different, Mr. Ingram advised Mr. Holmes that he could not change his recollection. Senate 389 (Ingram).

241. Also before his February 1985 grand jury appearance, Mr. Holmes visited Assistant District Attorney Katie Matison at her office. Trial 1357 (Matison).

242. Mr. Holmes had spoken to Ms. Matison on several occasions during the investigation and had tried to get her to say she had full responsibility for the Drew Fairchild case in the District Attorney's office. Trial 1350-52 (Matison).

243. In the third week of February 1985, Mr. Holmes again told her she had had full responsibility for Drew Fairchild's case and became "a little abusive and in a very fanatic way" said "that I was somehow an ingrate." Trial 1357-58 (Matison).

244. Holmes then asked to meet with Judge Nixon at the Hattiesburg courthouse because Mr. Holmes was nervous about the phone call. Senate 311-12 (Holmes); Senate 550-51 (Nixon).

245. Mr. Holmes appeared upset and angry when he met Judge Nixon. Senate 553 (Nixon).

246. Mr. Holmes said that he was in trouble because Mr. Ingram had disclosed the phone call to the federal investigators while Mr. Holmes had not disclosed it during his grand jury testimony. Mr. Holmes said, "There wasn't such a call, was there?" Senate 552 (Nixon).

247. Judge Nixon told Mr. Holmes there was such a call, there was nothing wrong with it, and he would tell the authorities about it if asked. Senate 552-53 (Nixon).

248. During their conversation, Holmes got the impression that Judge Nixon was not overly concerned about the phone call. Senate 313 (Holmes).

249. After that conversation, but before Mr. Holmes testified before the grand jury in February , Judge Nixon's lawyer confirmed to Mr. Holmes' lawyer that Judge Nixon remembered the phone call, and would tell about it if he were asked. Senate 314 (Holmes); Trial 990 (Holmes).

250. When Mr. Holmes testified before the grand jury on February 21, 1985, he testified that Judge Nixon remembered the phone call. RX 46, pp. 42-43, 53-54.

251. On March 29, 1985, Mr. Holmes was indicted by the Hattiesburg grand jury on one count of obstruction of justice and four counts of making false statements to the grand jury. HX 23.

252. A few days before he was indicted, Bud Holmes and his attorney were advised by the lead prosecutor, Reid Weingarten, that Mr. Holmes would not be indicted if he could provide incriminating testimony against Judge Nixon. House Hearings, Ex. N-26; House Hearings Ex. N-27; House 291 (Holmes); Trial 813-17 (Holmes).

253. The four false statement counts against Mr. Holmes related to testimony during Mr. Holmes' grand jury

appearances on July 20, 1984, February 5, 1984, and February 21, 1985. HX 23. None of the testimony which was alleged to be false in those four counts related to any action or testimony by Judge Nixon, and Mr. Holmes has conceded that the grand jury testimony charged to be false in those four counts was not given with any purpose to assist or aid Judge Nixon. House 321 (Holmes); Senate 307 (Holmes).

254. During the selection of a jury to decide the criminal charges against Mr. Holmes, his attorneys initiated plea bargaining negotiations which ultimately concluded in a plea bargain. HX 42, p. 9 (Stipulation No. 35).

255. Under the plea bargain, Mr. Holmes agreed to provide complete cooperation to the federal investigators and to undergo a polygraph examination. The federal government agreed to reduce the charges against Mr. Holmes from five felony counts to a single non-felony charge of contempt of court. HX 24.

256. Despite the terms of the plea agreement, the federal government never subjected Mr. Holmes to a polygraph examination on any subject relating to Drew Fairchild's case and Judge Nixon. Trial 826-27 (Holmes).

257. Before Mr. Holmes was sentenced, the lead prosecutor advised Mr. Holmes that under the contempt of court allegation, he could be sentenced to prison or could be fined, but could not receive both as a sentence. When the presiding judge imposed both a one-year sentence and a

$10,000 fine, the lead prosecutor stood mute and did not correct the error. Mr. Holmes paid the fine the same day, and successfully argued that he could not be sent to prison thereafter. House 276-77; 324-25 (Holmes); HX 61.

258. After Bud Holmes made his plea bargain, he was interviewed by several FBI agents at length on June 24, 1985. During this interview, Mr. Holmes purported to describe the telephone call to Wiley Fairchild that was placed from his farm. During that interview, however, Mr. Holmes completely omitted the assertion that he had told both Judge Nixon and Wiley Fairchild that he would pass the case Drew Fairchild's case to the inactive files. RX 54, p. 4.

H. Wiley Fairchild's Plea Deal

259. When Wiley Fairchild was indicted, he was in a "state of shock," because he did not think he had done anything wrong. Senate 162 (W. Fairchild); Post-Conviction 207 (W. Fairchild).

260. Wiley Fairchild did not think he had committed any crime. Senate 162 (W. Fairchild).

261. Wiley Fairchild was scared of lead prosecutor Reid Weingarten throughout the investigation period. Post-Conviction 207-09 (W. Fairchild); Senate 166 (W. Fairchild).

262. Wiley Fairchild was easily led around by prosecutor Weingarten. Post-Conviction 208 (W. Fairchild).

263. The prosecutors told Wiley Fairchild and his representatives that in order to get a plea deal, he would

have to give them a "smoking gun" on Judge Nixon, which Mr. Fairchild understood to mean something "real damaging" about Judge Nixon. Senate 163 (W. Fairchild); House 187, 193, 214 (W. Fairchild); Post-Conviction 191, 193 (W. Fairchild); Post-Conviction 30 (Baltar).

264. Wiley Fairchild "lay awake nights" trying to think up a smoking gun against Judge Nixon. Senate 164 (W. Fairchild); House 214 (W. Fairchild).

265. In connection with his plea deal, Wiley Fairchild got the following promises from prosecutor Weingarten which are not reflected in any of the plea agreement documents:

a. That the prosecutor would drop all charges against Mr. Fairchild if he became convinced that there was no connection between the oil properties sold to Judge Nixon and Drew Fairchild's case. House 184, 187 (W. Fairchild); Post-Conviction 190, 203-04 (W. Fairchild); Post-Conviction 45-46 (Baltar); Post-Conviction 250-51 (Hess); Post-Conviction 378 (Weingarten).

b. That he would help Mr. Fairchild retain his eligibility for contracts with the U.S. Department of Housing and Urban Development, despite his felony conviction, Post-Conviction

263-64 (Hess); Post-Conviction 400 (Weingarten).

c. That he would assist Wiley's application for an executive pardon. House 187-88 (Wiley); House 50 (Weingarten); Post-Conviction 209-10 (Wiley); Post-Conviction 70-72, 105-07 (Baltar); Post-Conviction 378-80 (Weingarten).

266. Wiley Fairchild made a plea deal with the federal government on November 26, 1984, just before he was scheduled to go to trial on one charge of paying an illegal gratuity and one count of making a false declaration before the grand jury. Mr. Fairchild agreed to plead guilty to the gratuity count, the false declaration count was to be dismissed, and Mr. Fairchild agreed to provide "continuing cooperation" to the federal prosecutors. HX 12.

267. As part of the plea agreement, the federal prosecutors recommended to the judge who sentenced Wiley Fairchild that Mr. Fairchild not receive any time in jail. House 184 (W. Fairchild).

I. Wiley Fairchild And The Truth

268. During his grand jury testimony in November 1984, Wiley Fairchild testified that he had lied during his first appearance before the grand jury, in July 1984. RX 41A, pp. 6-7 (W. Fairchild grand jury testimony, Nov. 28, 1984).

269. When he testified at Judge Nixon's trial, Wiley Fairchild said he lied to the FBI when they interviewed him. Trial 522 (W. Fairchild).

270. When he testified at the post-conviction hearing last August, Wiley Fairchild said he gave false testimony at Judge Nixon's trial. Post-Conviction 213, 216 (W. Fairchild).

271. Wiley Fairchild told the Senate that he has always told the truth in this case. Senate 171 (W. Fairchild).

272. After Wiley Fairchild made his plea deal, John Baltar (his assistant) prepared a "script" of key dates that prosecutor Weingarten wanted to make sure that Wiley Fairchild testified to before the grand jury. RX 37 (script); Post-Conviction 433-36 (Weingarten); Post-Conviction 50-55 (Baltar).

273. Several of the entries in the script (RX 37) were inaccurate or inconsistent with Wiley Fairchild's previous statements about the phone call from Bud Holmes' farm. Post-Conviction 201-02, 204, 214 (W. Fairchild); Post-Conviction 48-49, 53-55 (Baltar).

274. Prosecutor Weingarten prepared several models or outlines for Mr. Fairchild's testimony, and gave them to Mr. Fairchild. These materials are in Mr. Weingarten's handwriting, and were found in the records of Fairchild Construction. RX 38, 39; RX 76, p. 3 (Stipulated Testimony of M. Holleman); Post-Conviction 433-35 (Weingarten).

275. After making his plea bargain with the government, Wiley Fairchild changed his testimony to claim that Carroll Ingram did not approach him concerning an investment by Judge Nixon until after the August 1980 bust at the Hattiesburg Airport. RX 41A, p. 10 (W. Fairchild grand jury testimony, Nov. 28, 1984).

a. When he was interviewed by the FBI in April 1984, Mr. Fairchild said that Mr. Ingram had approached him concerning the investment in 1979, before the bust at the airport. RX 27.

b. During the plea negotiations, the prosecutor told Mr. Fairchild that the approach by Carroll Ingram had to have happened after the airport bust. Post-Conviction 37, 47-48 (Baltar); Post-Conviction 212-13, 215-16 (W. Fairchild).

c. At Judge Nixon's trial, Wiley Fairchild testified that the approach from Carroll Ingram occurred after the August 1980 bust at the airport. Trial 499 (W. Fairchild).

d. When he testified before the House Subcommittee and at the post-conviction hearing in Jackson, and before the Senate, Wiley Fairchild insisted that the approach from Carroll Ingram occurred long before the bust at the airport, in late 1979 or early 1980. House 217 (W. Fairchild); Post-Conviction 197, 212-13 (W. Fairchild); Senate 201 (W. Fairchild).

e. The House Managers have stipulated that Judge Nixon met with Wiley Fairchild by March 1980, after the approach to Mr. Fairchild by Carroll Ingram and several months before the drug bust at the airport. HX 42, p. 4 (Stipulation Nos. 32, 33).

276. During plea negotiations with Wiley Fairchild, the lead prosecutor, Reid Weingarten, told Wiley Fairchild that the telephone call from Bud Holmes' farm must have happened before Drew Fairchild's case was passed to the files. Post-

Conviction 199-200, 202, 214 (W. Fairchild); Post-Conviction 37, 48, 54 (Baltar).

277. Wiley Fairchild adopted that date for the phone call after he made the plea deal. RX 41A, pp. 19-20 (W. Fairchild grand jury testimony, Nov. 28, 1984).

278. Before he made his plea bargain, Wiley Fairchild stated on at least three occasions that Bud Holmes placed the call to him that evening. RX 47 (grand jury testimony of Karl Kepper, p. 10); Post-Conviction 31, 33 (Baltar); RX 36 (FBI memorandum dated Nov. 2, 1984 describing interview with Wiley Fairchild).

279. Prosecutor Weingarten told Mr. Fairchild that the call must have been placed by Judge Nixon. Post-Conviction 50 (Baltar).

280. Since he made his plea bargain, Wiley Fairchild has testified that the first voice he heard on the telephone was Judge Nixon's, but he concedes that his wife might have answered the telephone that night so he does not know who actually placed the call to his home. Senate 145 (W. Fairchild).

281. Before testifying at Judge Nixon's trial, Wiley Fairchild met with Prosecutor Weingarten and John Baltar to review his testimony. Based on Mr. Weingarten's instructions, John Baltar prepared another script for Mr. Fairchild to study to learn the testimony he had to give

to please the prosecutor. House 189 (W. Fairchild); Post-Conviction 65-70 (Baltar); RX 59.

J. Bud Holmes And The Truth

282. At least one witness contradicts most aspects of Bud Holmes' description of the events that led up to the phone call from his farm to Judge Nixon:

a. Mr. Holmes stated that Judge Nixon and Carroll Ingram came by his office and then he drove Judge Nixon to the farm. Senate 223-24 (Holmes).

But Carroll Ingram denies ever going to Mr. Holmes' office with Judge Nixon, and Judge Nixon recalls driving himself to the farm that night. Senate 434 (Ingram); Trial 1152 (Ingram); Senate 534 (Nixon); Trial 1545 (Nixon).

b. Mr. Holmes claims that Judge Nixon said that Wiley Fairchild asked him to put in a good word for his boy. Senate 223, 255 (Holmes); Trial 738 (Holmes).

But Mr. Fairchild denies ever asking Judge Nixon to put in a good word for his boy, stating that he only told Judge Nixon about his blackmail suspicions, Senate 123, 127, 143-44, (W. Fairchild); Judge Nixon denies ever telling Mr. Holmes that Mr. Fairchild asked him to put in a good word for his boy, and states that he told Mr. Holmes about the blackmail allegation. Senate 535-36, 580, 620 (Nixon); Trial 1538 (Nixon).

c. Mr. Holmes claims that he told Judge Nixon and Wiley Fairchild that he would pass Drew Fairchild's case to the inactive files. Senate 228, 257-58 (Holmes); Trial 740 (Holmes).

But neither Mr. Fairchild nor Judge Nixon remembers Mr. Holmes making that statement. Senate 666 (Nixon); Senate 136, 146-47 (W. Fairchild); House 195 (W. Fairchild); Trial 663 (W. Fairchild).

d. Mr. Holmes claims that Judge Nixon thanked Mr. Fairchild over the telephone for the opportunity to do business with him. Senate 232-33, 249, 321 (Holmes).

> But neither Mr. Fairchild nor Judge Nixon remembers Mr. Holmes making that statement. Senate 538-39 (Nixon); Senate 147 (W. Fairchild); House 179, 210 (W. Fairchild).

283. When he was interviewed by television news reporters in January of 1983 (RX 73), and when he gave a civil deposition, under oath, in March of 1987 (RX 65), Bud Holmes stated that the reason he passed Drew Fairchild's case to the files was that Bill Porter asked him to do so; on neither occasion did Mr. Holmes claim that any contact with Judge Nixon or with Wiley Fairchild had any impact on that action.

284. In a sworn affidavit dated February 29, 1988, Mr. Holmes stated that no incident involving Judge Nixon influenced him to take any action -- or not to take any action -- in the Drew Fairchild case (RX 66). Mr. Holmes repudiated that sworn affidavit during his testimony before the House. In repudiating the sworn affidavit, Mr. Holmes acknowledged that he had been asked to provide only the truth in the written statement, and that he had affirmed that a draft version of the affidavit was true when it was read to him over the telephone while his attorney was on the line. Mr. Holmes stated that he had not read the affidavit before he signed it. House 314 (Holmes).

285. Mr. Holmes testified at Judge Nixon's trial that, on the afternoon before the phone call was placed to Wiley

Fairchild from Mr. Holmes' farm, Judge Nixon called Mr. Holmes' office from Wiley Fairchild's office to say that he was coming by to see Mr. Holmes. Trial 871 (Holmes). Mr. Holmes later testified at trial that Judge Nixon did not call him from Mr. Fairchild's office before coming by the district attorney's office. Trial 918 (Holmes).

286. Mr. Holmes was asked at the House Subcommittee hearing whether he intended to sweep the Drew Fairchild case "under the rug" at the time of the phone call from his farm to Wiley Fairchild.

a. Mr. Holmes first stated that he "doubt[ed] seriously if I had any type thought process at that time about it." House 248 (Holmes).

b. When asked that same question a second time before the House Subcommittee, Mr. Holmes' answer was, "Basically, sure, that was my thoughts at the time." House 255 (Holmes).

c. When the House Managers asked the same question before the Senate, Mr. Holmes testified that he was not sure what he was thinking at the time of the phone call, but he did intend to sweep the case under the rug when he passed it to the files in December 1982. Senate 237 (Holmes).

d. When he was asked on cross-examination before the Senate which of those three answers was correct, Mr. Holmes replied, "You can use any one you want." Senate 326.

VII.

INSIGNIFICANCE OF THE PHONE CALL

287. When Wiley Fairchild appeared before the grand jury in July 1984, and was interviewed by the FBI in April 1984, he did not mention the phone call from Bud Holmes' farm because it did not seem relevant and did not come to his mind. House 183 (W. Fairchild); Senate 159 (W. Fairchild).

288. Wiley Fairchild considers his conversation with Judge Nixon about his blackmailing suspicions not to involve a discussion of Drew's case with Judge Nixon. Senate 156-59, 195 (W. Fairchild).

289. Wiley Fairchild told the grand jury that he did not discuss Drew's case with Judge Nixon (RX 30, p. 70), and he still considers that to be true testimony. Senate 156-57 (W. Fairchild); House 195 (W. Fairchild).

290. Although Carroll Ingram learned from Judge Nixon that the judge had conveyed some message from Wiley to Holmes concerning Drew Fairchild's case, Mr. Ingram did not consider

that he had discussed Drew Fairchild's case with Judge Nixon; neither did the lead prosecutor. House 404-05 (Ingram); Senate 417, 437-40 (Ingram); Trial 1069 (Ingram); House 46-47 (Weingarten).

291. Carroll Ingram doubts whether, when he testified before the grand jury, he even thought of Judge Nixon's comment about passing on a message from Wiley Fairchild to Bud Holmes concerning Drew Fairchild. Senate 440 (Ingram).

292. Mr. Ingram did not think his phone call with Judge Nixon was significant when it occurred. Senate 434 (Ingram). Mr. Ingram did not think to mention it to the federal investigators until Wiley Fairchild's lawyer told his lawyer that the federal investigators were interested in that matter. Senate 400-01 (Ingram).

293. Judge Nixon did not think of the blackmail conversations until Bud Holmes reminded him of them in February 1985, because they were a non-event. Senate 616 (Nixon).

294. Neither Wiley Fairchild nor Carroll Ingram nor Bud Holmes has ever been charged with any wrongdoing because they failed to mention the phone call in their July 1984 grand jury appearances. See HX 11 (W. Fairchild indictment); HX 23 (Holmes indictment); RX 45 (Justice Department letter dated Feb. 21, 1985, that Mr. Ingram is considered only a "fact witness").

VIII.

HOUSE SUBCOMMITTEE HEARINGS

295. During the House hearings concerning Judge Nixon's impeachment, a majority of the members of the Subcommittee made up their minds to vote for impeachment before they heard all the evidence. Senate 729 (remarks of Rep. Edwards).

IX.

NO ETHICAL VIOLATIONS

296. Prof. Geoffrey Hazard of Yale Law School was the Reporter for the American Bar Association Special Commission on Evaluation of Professional Standards, and the Reporter for the American Bar Association Special Commission on Standards of Judicial Administration. He also served as consultant to the American Bar Association Special Committee on Code of Judicial Conduct, and is a nationally recognized expert on matters of legal and judicial ethics. RX 68.

297. Prof. Hazard has reviewed two versions of the facts of this case: one based upon Judge Nixon's testimony and one based upon Mr. Holmes' testimony. Prof. Hazard has concluded that under either version of events, Judge Nixon committed no violation of the Code of Judicial Conduct in his business dealings with Wiley Fairchild or in his conversations with Bud Holmes and Wiley Fairchild that resulted in the phone call from Bud Holmes' farm to Mr. Fairchild's house. RX 68A.

X.

REID WEINGARTEN

298. When Prosecutor Weingarten testified before the House Subcommittee, he denied any involvement in the Petit Bois Island investigation that was conducted through the Hattiesburg grand jury at the same time as the Fairchild investigation. Mr. Weingarten said that he had "no official responsibility whatsoever" for the Petit Bois Island investigation, never interviewed any witness in connection with it, never appeared in the grand jury on it, and never questioned a witness before the grand jury concerning it. House 62-63 (Weingarten).

299. In truth, Mr. Weingarten questioned Bud Holmes concerning Petit Bois Island on at least two occasions: (i) during Mr. Holmes' grand jury appearances on September 5, 1984, RX 33, pp. 20-28, and (ii) on February 21, 1985, RX 46, pp. 65-67.

Respectfully submitted,

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Date: October 24, 1989

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FINAL ARGUMENTS ON THE MERITS AND SENATE DISPOSITION

UNANIMOUS-CONSENT AGREEMENT FIXING DATE AND TIME FOR FINAL ARGUMENT AND DELIBERATION ON THE ARTICLES OF IMPEACHMENT

(From the Congressional Record—Senate, October 26, 1989)

Mr. MITCHELL. Mr. President, I ask unanimous consent that the Senate resume consideration of the impeachment proceedings against Judge Walter L. Nixon, Jr., of the Southern District of Mississippi at 2 p.m. on Wednesday, November 1, for any remaining motions offered by Judge Nixon and for final arguments on the merits by the managers on the part of the House of Representatives and by Judge Nixon and his counsel for not more than 1½ hours per side.

I further ask unanimous consent that on Thursday, November 2, at 2 p.m., the Senate shall meet in closed session to deliberate on the articles of impeachment and the pending motions, and that these orders have effect notwithstanding any other rule of the Senate, including rule XXII.

The PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. MITCHELL. Mr. President, for the information of Senators, I indicate now that the joint leadership will object to any unanimous-consent requests to permit committees to meet on Wednesday, November 1, and Thursday, November 2, at 2 p.m., so that all Senators may attend these important proceedings and that a live quorum will be commenced on each of those days at 1:45 p.m.

UNANIMOUS-CONSENT AGREEMENT REGARDING THE HOUSE MANAGERS' PRESENTATION IN THE FINAL ARGUMENT

[From the Congressional Record—Senate, October 26, 1989]

Mr. WIRTH. Mr. President, earlier today, by unanimous consent, the Senate scheduled final argument on the impeachment of Judge Walter L. Nixon, Jr., of the Southern District of Mississippi, for Wednesday, November 1, at 2 p.m. The Senate agreed to allot 1½ hours for each side to present its arguments on the merits, including Judge Nixon's pending motions.

The House managers have requested permission to share their presentation among three managers, rather than the two persons ordinarily provided for in the Senate's impeachment rules. Judge Nixon has indicated that he wishes to divide his presentation between himself and one of his counsel. I ask unanimous consent that in this Wednesday's final argument on this impeachment three managers from the House of Representatives be permitted to present argument to the Senate.

The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered.

FINAL ARGUMENT OF THE PARTIES AND QUESTIONS FROM THE SENATE

(From the Congressional Record—Senate, November 1, 1989)

CALL OF THE ROLL

The President pro tempore. The Chair, in his capacity as a Senator from West Virginia, suggests the absence of a quorum. The clerk will call the roll.

The legislative clerk proceeded to call the roll and the following Senators entered the Chamber and answered to their names:

[Quorum No. 9]

Burdick
Byrd
Graham
Grassley
Inouye
Mitchell
Sarbanes

The President pro tempore. A quorum is not present. The clerk will call the names of the absentees.

The legislative clerk resumed the call of the roll and the following Senators entered the Chamber and answered to their names:

Cochran
Ford
Riegle

The President pro tempore. A quorum is not present. The clerk will continue to call the names of the absent Senators.

The legislative clerk resumed the call of the roll and the following Senators entered the Chamber and answered to their names:

Adams
Armstrong
Baucus
Bentsen
Biden
Bingaman
Bond
Boren
Boschwitz
Bradley
Breaux
Bryan
Bumpers
Burdick
Burns
Byrd
Chafee
Coats
Cohen
Conrad
Cranston
D'Amato
Danforth
Daschle
DeConcini
Dixon
Dodd
Dole
Domenici
Durenberger
Exon
Fowler
Garn
Glenn
Gore
Gorton
Gramm
Harkin
Hatch
Hatfield
Heflin
Heinz
Helms
Hollings
Humphrey
Jeffords
Johnston
Kassebaum
Kasten
Kennedy
Kerrey
Kerry
Kohl
Leahy
Levin
Lieberman
Lott
Lugar
Mack
McCain
McClure
McConnell
Metzenbaum
Mikulski
Moynihan
Murkowski
Nickles
Nunn
Packwood
Pell
Pressler
Pryor
Reid
Robb
Rockefeller
Roth
Rudman
Sanford
Sasser
Shelby
Simon
Simpson
Specter
Stevens
Symms
Thurmond
Wallop
Warner
Wilson
Wirth

The PRESIDENT pro tempore. A quorum is present.

COURT OF IMPEACHMENT

The PRESIDENT pro tempore. The Senate will please be in order.

Under the previous order, the hour of 2 o'clock p.m. having arrived and a quorum having been established, the Senate will resume its consideration of the articles of impeachment against Judge Walter L. Nixon, Jr.

The House managers and the respondents will please take their places in the well of the Chamber.

The deputy Sergeant at Arms will make the proclamation.

The DEPUTY SERGEANT AT ARMS. Hear ye! Hear ye! Hear ye! All persons are commanded to keep silence, on pain of imprisonment, while the Senate of the United States is sitting for the trial of the articles of impeachment exhibited by the House of Representatives against Walter L. Nixon, Jr., U.S. district judge for the Southern District of Mississippi.

The PRESIDENT pro tempore. The majority leader is recognized.

PRIVILEGE OF THE FLOOR

Mr. MITCHELL. Mr. President, I ask unanimous consent that the floor privileges during today's impeachment proceedings of Judge Walter L. Nixon, Jr., be granted to the individuals listed on the document I now send to the desk.

MANAGERS OF THE HOUSE OF REPRESENTATIVES

Representative Don Edwards, Representative F. James Sensenbrenner, Jr., Representative Benjamin L. Cardin, Representative William Dannemeyer.

HOUSE MANAGERS STAFF

Alan I. Baron, Special Counsel; William M. Jones, General Counsel; Daniel M. Freeman, Counsel; Peter Keith; Colleen Kiko; Katie Urban; Kathleen Leroy; Shelley Hettleman.

JUDGE NIXON AND REPRESENTATIVES

Judge Walter L. Nixon, Jr., David O. Stewart, Peter M. Brody.

SENATE

Martha Pope, Chief of Staff, Majority Leader.
Charles Kinney, Democratic Policy Committee.
George Carrenbauer, Democratic Policy Committee.
Anita Jensen, Senator Mitchell.
Rebecca Roberts, Office of President pro tempore.
Roy Greenway, Senator Cranston.
Alan Thomas, Senator Cranston.
Sheila Burke, Chief of Staff, Republican Leader.
Robert Dove, Republican Leader's Staff.
Dennis Shea, Republican Leader's Staff.
Jim Whittinghill, Republican Leader's Staff.
Richard Quinn, Republican Leader's Staff.
Mike Tongour, Assistant Republican Leader's Staff.
Michael Davidson, Senate Legal Counsel.
Morgan Frankel, Assistant Senate Legal Counsel & Committee Counsel.
Claire M. Sylvia, Assistant Senate Legal Counsel.
Jack Sousa, Rules Committee.
Jeff Peck, Judiciary Committee, Majority.
Terry Wooten, Judiciary Committee, Minority.
Thad Strom, Judiciary Committee, Minority.

IMPEACHMENT COMMITTEE

Donald A. Purdy, Jr., Counsel.
Anthony L. Harvey, Administrator.
P. Casey McGannon, Staff Assistant and Exhibits Clerk.
Isabel T. McVeigh, Staff Assistant and Journal Clerk.

MEMBERS' STAFF REPRESENTATIVES

Bob Redding, Senator Fowler.
Scott Williams, Senator Heflin.
Ellen Marshall, Senator Wirth.
David Chartier, Senator Reid.
Kerry Walsh Skelly, Senator Robb.
Keenan Peck, Senator Kohl.
Kevin Dempsey, Senator Danforth.
Amy Dunathan, Senator Chafee.
John H. Moseman, Senator Murkowski.
Reginald E. Jones, Senator Jeffords.
Mary Beth Savary, Senator Mack.
Taylor Bowlden, Senator Symms.

The PRESIDENT pro tempore. Without objection, it is so ordered. The majority leader is recognized.

Mr. MITCHELL. Mr. President, the records of the Senate indicate that 11 Senators remain to be sworn for this impeachment. They are Senators Armstrong, Bond, Cranston, DeConcini, Graham, Heinz, Helms, Humphrey, Kennedy, McCain, and Roth. The Secretary will note the names of the Senators who are sworn today and will present to them for signing the book which is the Senate's permanent record of the administration of the oath.

The PRESIDENT pro tempore. Any Senator who has not taken the oath will please now rise and raise your right hands and be sworn.

Do you solemnly swear that in all things appertaining to the trial of the impeachment of Walter L. Nixon, Jr., judge of the U.S. District Court for the Southern District of Mississippi, now pending, you will do impartial justice according to the Constitution and laws: So help you God?

SENATORS. I do.

The PRESIDENT pro tempore. The majority leader is recognized.

Mr. MITCHELL. Mr. President, under the leadership of its chairman, the Senator from Georgia [Mr. FOWLER] and its vice chairman, the Senator from Missouri [Mr. DANFORTH], the committee appointed under Senate Resolution 128, whose membership also includes Senators Heflin, Chafee, Wirth, Murkowski, Reid, Jeffords, Robb, Mack, Kohl, and Symms, has performed the duties provided for by rule XI of the Senate's impeachment rules. The committee report, which was received as Senate Report 101-164, was filed on October 16, 1989. In accordance with impeachment rule XI, the committee report certified that Senate Hearing Report 101-247, which reprints the committees proceedings, is a transcript of the proceedings and testimony had and given before the committee.

Before proceeding further I would like to verify with the Presiding Officer, as was done in the impeachment trials of Judge Claiborne and Judge Hastings, that the evidence and testimony received by the Senate from the committee shall, as prescribed in rule XI, "be considered for all intents and purposes, subject to the right of the Senate to determine competency, relevancy, and materiality as having been received and taken before the Senate * * *."

Will the Presiding Officer advise the Senate whether this is correct?

The PRESIDENT pro tempore. The majority leader is correct. The testimony and other evidence reported by the committee will be considered in accordance with impeachment rule XI as having been received and taken before the Senate.

The majority leader is recognized.

Mr. MITCHELL. Rule XI provides that the Senate's receipt of evidence reported by the committee is subject to the Senate's right to determine competency, relevancy, and materiality. Further, rule XI provides that nothing in it prevents the Senate from sending for any witness and hearing that witness' testimony in open Senate, or by order of the Senate having the entire trial before the full Senate. Judge Nixon is, in fact, renewing before the full Senate a motion that he made originally before the Impeachment Trial Committee to have the witnesses in this impeachment summoned to testify before the full Senate.

Judge Nixon is also renewing before the full Senate a motion to dismiss article III of the articles of impeachment against him. The two motions, Judge Nixon's memoranda in support of them, and the responses of the House, together with the order entered by the Impeachment Trial Committee, are before each Senator in a white-covered pamphlet entitled "Judge Nixon's Motions Originally Presented to the Senate Impeachment Trial Committee and Renewed Before the Full Senate."

Neither party has asked to present oral argument on Judge Nixon's two motions at a time separate from the argument of the parties on the merits.

In accordance with the unanimous-consent agreement of last week, each side will be permitted no more than 1½ hours for its argument, which will include argument on the motions and argument on the final merits.

Under impeachment rule XXII, final argument will be opened and closed by the House.

Mr. President, as we have done in the past, we have provided that counsel may face the full Senate during their presentations. They should remain mindful, nevertheless, that the proceedings are under the direction of the Presiding Officer.

On their part, Senators should recall that any questions they have should, pursuant to impeachment rule XIX, be reduced to writing and be put by the Presiding Officer.

There is secretarial assistance available in the cloakroom to aid Members in the drafting of questions. Questions may be sent to the Chair during the argument for a reading by the Chair at the appropriate times.

Managers on behalf of the House of Representatives, Representative Don Edwards, Representative Benjamin Cardin, Representative James Sensenbrenner, and Representative William Dannemeyer, and special counsel to the House, Alan Baron, and assistant special counsel, Peter Keith, are present at the managers' table.

David Overlock Stewart and Peter Brody are counsel to Judge Nixon and are present with him.

The PRESIDENT pro tempore. The Chair understands that argument on the pending motions and final argument for the House will be presented by Representative Edwards, Representative Sensenbrenner, and Representative Cardin. Mr. Edwards has asked to speak first.

Mr. Edwards, do you desire to reserve a period of time for closing, and if so how much?

Mr. MITCHELL. Mr. President, before Representative Edwards begins, I have just been advised that the House has just begun a rollcall vote and so as to accommodate the Members of the House, and since the proceedings have not yet begun, I would suggest for their convenience, unless they wish to act otherwise, that they be permitted to vote and then return to begin the proceedings.

Is that the desire of House Manager Edwards?

Mr. Manager EDWARDS. Yes, please.

The PRESIDENT pro tempore. Very well, Mr. Edwards.

We will suspend until the House managers have returned.

Mr. MITCHELL. Mr. President, I understand that Senator Heinz has not previously been sworn and is available to be sworn. May I suggest that to the Presiding Officer?

Mr. COCHRAN. Neither was I present.

Mr. MITCHELL. Apparently, there are also Senator Cochran and Senator McConnell.

May I suggest that the Presiding Officer swear in the Senators that have not previously been sworn?

The PRESIDENT pro tempore. The Senate will please be in order.

Those Senators who remain to be sworn will please stand, raise their right hand, and be sworn.

Do you solemnly swear that in all things appertaining to the trial of the impeachment of Walter L. Nixon, Jr., judge of the U.S. District Court for the Southern District of Mississippi, now pending, you will do impartial justice according to the Constitution and laws: So help you God?

SENATORS. I do.

Mr. MITCHELL. Mr. President, may we have order?

Mr. President, this may be an appropriate time for me to restate for the benefit of Senators the proposed schedule with respect to these proceedings.

Mr. SARBANES. Mr. President, will the majority leader yield for a question?

Mr. MITCHELL. Yes, certainly.

Mr. SARBANES. It is my understanding that most Members of the Senate were sworn in at the time the articles of impeachment against Judge Nixon were exhibited, and that all that was left to be done today was to swear in those few Members who had not been sworn in on this occasion; is that correct?

Mr. MITCHELL. That is correct.

Mr. SARBANES. I thank the majority leader.

Mr. MITCHELL. Mr. President, as with the procedure followed in the prior impeachment proceedings, following consultation with the distinguished Republican leader, it is my intention that we will hear the arguments of counsel today and then discontinue this proceeding until 2 p.m. tomorrow, when we will go into closed session for the purpose of deliberating on the articles.

I encourage all Senators to remain present during the presentation of arguments today and to review the material, the record and briefs, for those who have not already done so, prior to deliberation tomorrow.

The deliberation tomorrow will continue for so long as any Senator wishes to address the subject. If deliberation is completed tomorrow prior to the close of business tomorrow, then we will vote on the two motions made by Judge Nixon and the three articles on Friday morning.

If the deliberation is not completed tomorrow, why then, of course, we will simply continue the deliberations until such time as they are completed and schedule the votes appropriately thereafter.

That is the plan and the scheduling, and as with the previous impeachment proceeding, there will be no waiver for committees to meet during the session today and tomorrow. Senators' constitutional duty requires them to be present in fairness to all parties to these proceedings, and Senators are not expected to be attending to other business during the time in which these proceedings are underway.

Accordingly, I hope that all Senators will cooperate and be present, and if we do complete deliberation tomorrow, we should be able to complete the voting on the motions and articles sometime during the day on Friday.

Mr. President, may I suggest to the House managers that in the event votes occur during these proceedings today or tomorrow, rather than discontinuing the proceedings, the House Members go to vote one at a time so that we can keep the proceedings going.

Is that agreeable to the House managers?

Mr. Manager **EDWARDS**. That is agreeable.

Mr. **MITCHELL**. Is that agreeable to counsel for Judge Nixon?

Mr. **STEWART**. Yes, sir.

Mr. **MITCHELL**. Mr. President, I thank my colleagues for their attention, and I yield the floor to Representative Edwards.

The **PRESIDENT** pro tempore. The Chair will inquire of the majority leader as to whether or not there is any Senator who remains to be sworn.

Mr. **MITCHELL**. Mr. President, I am advised that Senator Armstrong has not been sworn.

Mr. **ARMSTRONG**. I apologize, Mr. President.

The **PRESIDENT** pro tempore. The Senator will please raise his right hand and be sworn.

Do you solemnly swear that in all things appertaining to the trial of the impeachment of Water L. Nixon, Jr., judge of the U.S. District Court for the Southern District of Mississippi, now pending, you will do impartial justice according to the Constitution and laws: So help you God?

Mr. **ARMSTRONG**. I do.

The **PRESIDENT** pro tempore. Representative Edwards, do you wish to reserve a period of time for closing, and if so, how much?

Mr. Manager **EDWARDS**. Mr. President, the House Members desire to reserve any time remaining after they have made their initial statements for the purposes of rebuttal.

The **PRESIDENT** pro tempore. Very well.

Mr. Manager **EDWARDS**. Thank you, Mr. President. On behalf of the House of Representatives, I thank the Senate for the opportunity to appear today and present closing argument. The House greatly appreciates the time and effort the Senate has taken in his important matter.

The members of the Impeachment Trial Committee, so ably chaired by Senator Fowler and vice-chaired by Senator Danforth, deserve special commendation. The committee was most diligent in studying the record, questioning witnesses during the trial, and summarizing the evidence for the full Senate.

Impeachment of a public official is always a very serious and tragic matter. This has been my fourth impeachment, and each has been a troubling experience. It is disturbing to discover that a high official has violated the public trust.

It is unfortunate that this impeachment comes before you today. But when a Federal judge shows himself unfit to hold his prestigious office, the Congress must act to protect the public interest and preserve the integrity of the judiciary.

We deal here with a Federal judge who committed perjury. A man who lied to law enforcement officials in an interview, and then lied again in sworn testimony before a grand jury. A man who was properly convicted of perjury by a jury of his peers. A man who was sentenced to prison and who has exhausted his appellate rights, all the way to the Supreme Court. A man who, despite his crimes, demands the high privilege of remaining on the Federal bench.

From the beginning, we in the House recognized the gravity of impeachment proceedings. As chairman of the subcommittee assigned to investigate this matter, I felt that a felony conviction, in and of itself, is not enough to remove a judge from office.

Even in this day and age, a prominent official might be unfairly convicted because of race, politics, or overreaching by prosecutors. In part because of my subcommittee's hearings on such matters as ABSCAM, COINTELPRO, and our general oversight of the Department of Justice and FBI, we wanted to make sure that Judge Nixon had been treated fairly.

We chose to investigate this matter thoroughly, no matter how long it took. Our counsel spent weeks in Mississippi tracking down every possible lead that might exonerate the Judge. We held the equivalent of a trial in the House. We required all the key witnesses to come forward and testify under oath, subject to unlimited cross-examination. We gave Judge Nixon every possible opportunity to present evidence and argue his cause. Notwithstanding the perjury convictions, we had to be convinced that very serious misconduct had taken place.

We discovered that the jury verdict was fully justified. The evidence against Judge Nixon is overwhelming. Sadly, the evidence shows that Judge Nixon lied to a Federal grand jury under oath, and to Federal investigators during an interview.

After carefully investigating the facts and hearing all the evidence, the House voted 417 to 0 in favor of three articles of impeachment. Accordingly, you must now grapple with the same question we faced in the House. Is a man who repeatedly lied fit to hold the high office of Federal judge? I hope you agree that the answer is obvious. To preserve the integrity of the judiciary, to maintain public respect for law and order, Judge Nixon must be removed from the bench.

You have learned that following a divorce and remarriage, and with a growing family, Judge Nixon felt strapped by his judicial salary. Believing himself to be in need of supplemental income, he met with Carroll Ingram. Mr. Ingram is a friend of Judge Nixon and an attorney who regularly practiced before him. Mr. Ingram represented Wiley Fairchild, an oil and construction millionaire. Even though he did not know Mr. Fairchild personally, Judge Nixon solicited an investment. Judge Nixon asked Ingram to ask Wiley Fairchild to put him in an oil deal.

Mr. Ingram approached his client, and Wiley Fairchild did as Judge Nixon requested. Fairchild gave Judge Nixon a lucrative oil investment that was not available to the general public, on very favorable terms.

Wiley Fairchild financed the investment completely. Fairchild gave Judge Nixon a $9,500 loan at an interest rate 5 points below the market rate, so that Judge Nixon was never out of pocket any money at all. Judge Nixon's other outside investments either barely were profitable or lost money. But the Fairchild investment was different. The $9,500 Fairchild investment paid off handsomely, generating more than $73,000 in income to Judge Nixon

Judge Nixon was grateful for the investment. He knew he owed Wiley Fairchild a favor and told him, "If I can ever help you I will, and if I can't I'll just tell you I can't." Those were Judge Nixon's exact words. And with large royalty checks coming in, Judge Nixon was eager for other investments with Fairchild, to obtain even more income.

The time came when Judge Nixon had an opportunity to return the favor. As fate would have it, Wiley Fairchild's son, Drew, committed a crime. Drew was one of the managers at the Hattiesburg airport. Drew became involved in a conspiracy to smuggle a planeload of marijuana into the United States.

But the plot failed. The airplane was seized and Drew was ultimately indicted on State drug charges. The local prosecutor who handled Drew's drug smuggling case—this is the local district attorney—was Bud Holmes. Holmes has been a very close friend of Judge Nixon for 30 years. They hunt and fish together.

Wiley Fairchild did not like the way State prosecutor Holmes was handling his son's drug case. Even though Drew had agreed to plead guilty in return for a sentence of no jail time, a fine and 5 years probation, the case was dragging on with no resolution.

Worse, Wiley Fairchild thought his son was the victim of unequal justice. Robert Royals, Drew's partner at the airport, was also guilty but had never been prosecuted. Wiley thought Holmes was blackmailing him, that Drew had been prosecuted only because his father was wealthy.

Wiley Fairchild knew Holmes was a close friend of Judge Nixon. He also believed Judge Nixon owed him a favor because of the investment. So Wiley Fairchild complained to Judge Nixon about how Holmes was handling the drug case.

Mr. Fairchild told Judge Nixon that his son Drew was guilty, but that Royals was guilty too and should be prosecuted. Fairchild did not beg the judge for help. He did not need to ask. Even Judge

Nixon admits the message was loud and clear. Fairchild was calling in the favor, and wanted Judge Nixon to talk with Bud Holmes, the local district attorney, about Drew's drug case.

Grateful for the investment and hopeful for other deals, Judge Nixon did exactly what Wiley Fairchild wanted. The very same afternoon after meeting with Fairchild, Judge Nixon spoke with Bud Holmes about the drug case. Judge Nixon told Holmes he was happy with the investment and was thinking of doing some more deals with Fairchild. And he told Bud Holmes that Wiley Fairchild had asked him to put in a good word for Drew in the drug case.

Holmes was willing to help his old friend Judge Nixon solidify the financial relationship and pick up some brownie points with Fairchild. So Holmes told Judge Nixon he would pass the drug smuggling case to the file.

What does it mean in Mississippi procedure to pass a case to the file? It means that the case becomes inactive, notwithstanding Drew's guilty plea. With his case passed to the file, Drew Fairchild would suffer no fine, no probation, no adverse consequences of any kind. The case goes nowhere, as if there had never been a prosecution.

After Holmes told him that the *Drew Fairchild* case would be passed to the file, Judge Nixon telephoned Wiley Fairchild. The judge told Wiley that he had talked with Holmes, and that the case would be taken care of to Wiley's satisfaction. Fairchild thanked Judge Nixon for speaking with Holmes about the handling of the drug case and told Judge Nixon, "I'm satisfied." Bud Holmes then took the telephone from Judge Nixon and told Fairchild, "when this man—Judge Nixon—asks me to do something, I don't ask questions. I just go ahead and do it."

Shortly thereafter, in a continuing effort to score points with Wiley Fairchild, Judge Nixon told Fairchild's attorney, Carroll Ingram, about his involvement in the drug case. After discussing the possibility of more investments, Judge Nixon took credit for helping Drew. Judge Nixon's telephone conversation with Ingram is important evidence.

Judge Nixon told Ingram he had spoken with Bud Holmes, the district attorney, about the *Drew Fairchild* drug case, with "positive"—that is his words—results. That telephone conversation was a confession by Judge Nixon; a confession that he had talked with Holmes about the case; a confession that he had influenced the case, by achieving positive results with Holmes.

In December 1982, the *Drew Fairchild* drug smuggling case was passed to the file upon motion by District Attorney Holmes. This was unprecedented. Everyone agrees that never before had there been a case passed to the file, when the defendant had already pled guilty like Drew.

Wiley Fairchild and Bud Holmes have both testified that but for Judge Nixon's involvement, the *Drew Fairchild* case would not have been passed to the file. Carroll Ingram also associates the passing of the case to the file with Judge Nixon's involvement.

Fortunately, a new local judge assumed the bench, noticed that the case has been passed to the files, and complained publicly about the handling of the case. In January 1983, Holmes, the district attorney, reinstated the case to the active docket.

Acting upon information supplied by one of Wiley Fairchild's employees, in late 1983 Federal law enforcement authorities began to investigate the Nixon-Fairchild drug case. Early in the investigation, in April 1984, the FBI and the Department of Justice interviewed Judge Nixon to find out if he knew anything about the drug case.

But during the interview Judge Nixon did not disclose his contacts with Holmes, Fairchild, and Ingram about the drug case. Judge Nixon was given every chance in this interview to be truthful and forthcoming. Instead, Judge Nixon categorically denied any involvement in the case, over and over again.

Three months later, in July 1984, a Federal grand jury was empaneled to investigate the handling of the *Drew Fairchild* drug smuggling case. Again, during his testimony before the grand jury, Judge Nixon did not disclose his involvement, but instead swore that he never discussed the case with Holmes. Judge Nixon swore that he never talked to anyone about the case.

This false grand jury testimony led to his conviction on two counts of perjury following a lengthy criminal trial in February 1986.

The three articles of impeachment brought to you by the House are simple and straightforward.

Article I deals with Judge Nixon's statement under oath to the grand jury that District Attorney Bud Holmes never discussed the *Drew Fairchild* case with Judge Nixon. This specific statement was found by the jury to be false, and led to Judge Nixon's first perjury conviction.

This sworn statement by Judge Nixon was obviously false or misleading as charged. The evidence shows that Judge Nixon in fact discussed the *Drew Fairchild* case with Holmes. Even in Judge Nixon's own version of the events, he talked with Holmes about the case.

Article II deals with part of Judge Nixon's answer in the grand jury to the simple question, "All right, Judge. Do you have anything you want to add?"

The jury found the following part of Judge Nixon's answer to be false:

> Now I have had nothing whatsoever officially or unofficially to do with the Drew Fairchild criminal case in Federal court or State court. . . . I never handled any part of it, never had a thing to do with it at all, and never talked to anyone, State or Federal, prosecutor or judge, that in any way influenced anybody with respect to this case.

This quoted testimony led to Judge Nixon's second perjury conviction, and is the basis for article II.

This statement in article II was clearly false, as proven by the collective testimony of Bud Holmes, Wiley Fairchild and Carroll Ingram. Judge Nixon did have unofficial involvement in the drug case. He did talk with Wiley Fairchild, the defendant's father, about the case. He did talk with Bud Holmes, the State prosecutor, about the case.

And four witnesses prove that Judge Nixon influenced the matter. Bud Holmes and Wiley Fairchild have both testified that the drug case was passed to the file because of Judge Nixon's involvement. Carroll Ingram described Judge Nixon's admission to him that he had spoken to Holmes about the case, with positive results. And Judge Nixon himself has stipulated that in the telephone conversation from the farm, Fairchild thanked him for speaking with Holmes about the case and told Judge Nixon, "I'm satisfied."

That brings us to article III. Some of you may wonder, why a third article of impeachment? Judge Nixon was found guilty on only two counts of perjury. Why expand the charges beyond the criminal conviction?

The answer is simple. Judge Nixon made many more false statements beyond those that put him in prison.

Judge Nixon committed a serious crime by lying to law enforcement officials during the interview. In our system of justice, a citizen has a constitutional right to remain silent when Federal investigators ask questions. You don't have to cooperate. But if you agree to an interview, you have to tell the truth. That is the law. If you conceal information or lie, you violate 18 U.S.C. 1001. You commit a felony.

We listened closely to the tape of his interview. I urge you to do the same. Judge Nixon was repeatedly asked during the interview whether he knew anything about the *Drew Fairchild* drug case. His interview answers were riddled with falsehoods. Judge Nixon told the interviewers that he never discussed with Wiley Fairchild anything about Wiley's sons case; that Wiley Fairchild never brought up his son's case; that he had no knowledge of the case and didn't even know Drew Fairchild existed, except what he read in the newspaper; that nothing was ever mentioned about Wiley Fairchild's son; that he never heard about the case; that he had nothing to do with the case; and that Bud Holmes never talked to him about the case.

These interview statements are just as false as the grand jury testimony in articles I and II, that led to his perjury convictions. We could not ignore these false interview answers. These lies were the start of a long pattern of deceit and coverup by Judge Nixon.

The testimony of Wiley Fairchild, Bud Holmes and Carroll Ingram proves these interview statements are false. Even Judge Nixon has grudgingly conceded that many of his interview answers were false. He admits that Drew was mentioned. He admits that he knew Drew existed, from his conversation with Fairchild and Holmes. He admits Wiley brought up his son's case. He admits he heard about the case from Wiley Fairchild and Bud Holmes. In his own current version of the events, Judge Nixon proves that his inteview answers are false.

The deceit and concealment continued when Judge Nixon appeared before the grand jury. Article III again goes beyond the jury verdict, because there were additional sworn statements by Judge Nixon in his grand jury testimony that are just as false as the testimony that put him in prison. We could not ignore these lies, either.

For example, Judge Nixon swore to the grand jury that he did not know of any reason he would have met with Wiley Fairchild after the investment was finalized in February 1981. Yet, Judge Nixon has admitted that at the time he made this statement, he specifically recalled his meeting when Fairchild complained about the handling of the drug deal. You simply can not reconcile Judge Nixon's own testimony.

Judge Nixon swore to the grand jury that he had given them all the information that he had, and had withheld nothing. Yet Judge Nixon told us last year in the House that he deliberately withheld his conversations with Holmes and Fairchild, because he thought it would be "irresponsible" to "blabber" about "rumors" that had "been resolved." Again, Judge Nixon proves himself to be a liar.

Judge Nixon swore to the grand jury, without qualification, that he never talked to anyone about the drug case. This statement was patently false.

We could not ignore these additional false statements. We had conclusive evidence of a continuing pattern of deceit and falsehood. So, in article III we allege that Judge Nixon concealed the truth. First, by one or more false or misleading statements in his interview, then by one or more false or misleading statements in his grand jury testimony.

Judge Nixon has broken the law, tainted the integrity of the judiciary and brought disrepute on the courts. By his misconduct, he has forfeited his privilege of serving on the Federal bench.

Mr. President, when you look at the evidence carefully, I believe you will agree that Judge Nixon must be removed from office.

Thank you, Mr. President, I yield now to my colleague from Wisconsin, Mr. Sensenbrenner.

The PRESIDENT pro tempore. Thank you, Representative Edwards.

Representative Sensenbrenner will now continue the argument for the House.

Mr. Manager SENSENBRENNER. Thank you, Mr. President.

It is a great privilege to appear before you today on behalf of the House of Representatives. I join with Mr. Edwards in thanking the Senate for your careful attention to this matter. Your diligence is a tribute to the impeachment process required by the Constitution of the United States.

There are basically two questions before you in connection with this impeachment. First, does the conduct alleged in the three articles of impeachment state an impeachable offense? There is really no debate on this point. The articles allege misconduct that is criminal and wholly inconsistent with judicial integrity and the judicial oath. Everyone agrees that a judge who lies under oath, or who deceives Federal investigators by lying in an interview, is not fit to remain on the bench.

The second question is, Did the conduct occur? The 14 statements are not figments of the imagination of the managers of the House of Representatives. Judge Nixon made the statements. Are the statements false or misleading, as charged? And were they intentionally made, or simply a series of unfortunate but honest mistakes? Fourteen honest mistakes?

As shown by the evidence presented to the Impeachment Trial Committee, there are two versions of the events here. Judge Nixon paints one picture. Wiley Fairchild, Bud Holmes, and Carroll Ingram paint something quite different. Judge Nixon's version of his meeting with Fairchild concerning the drug case, his conversation with Holmes about the drug case, and his phone call back to

Fairchild is far more benign than the collective picture painted by the other witnesses. The collective testimony of Fairchild, Holmes, and Ingram is very damning to Judge Nixon. The testimony of these three witnesses proves that the *Drew Fairchild* case was fixed, as a result of Judge Nixon's involvement. Drew Fairchild's case was passed to the file as a result of Judge Nixon's participation.

Wiley Fairchild, Bud Holmes, and Carroll Ingram are all friends of Judge Nixon. They express their high regard for him at every opportunity. They would like to help Judge Nixon stay on the bench, if they can.

But when asked under oath about the specific facts at issue, Holmes, Fairchild, and Ingram describe Judge Nixon's active and knowing involvement in very serious misconduct. Through the good work of Judge Nixon, the *Drew Fairchild* drug smuggling case is passed to the file with no fine, no probation, no adverse consequences to Drew Fairchild of any kind, even though he has plead guilty to smuggling a planeload of marijuana into the United States. Passed to the file, because Judge Nixon is a friend of Wiley Fairchild and put in a good word for his son with the local prosecutor.

Why does Judge Nixon become involved? Because he had received a very lucrative investment from Wiley Fairchild and wanted additional investments. How do we know? Because after his contacts with Holmes and Fairchild, Judge Nixon took credit for helping Drew when he spoke with Ingram about other investments. In order to enhance his financial relationship with Wiley Fairchild, Judge Nixon became involved in the drug case behind the scenes. He spoke with Holmes as Fairchild wanted and put in a good word for Drew.

In considering articles of impeachment, we bent over backwards to be fair to Judge Nixon. Federal judges are not supposed to solicit investments. Federal judges are not supposed to get sweetheart deals not available to the general public, with loans 5 points below what they paid to a bank that very same week. Federal judges are not supposed to handle litigation involving a party that puts them in a favorable deal and pays them thousands of dollars in royalties. Federal judges are not supposed to help out drug smugglers. But impeachment is serious business, with only one sanction. Even though this is far from model conduct for a Federal judge, we do not seek Judge Nixon's removal from office for these acts.

But Judge Nixon committed far more serious offenses. Offenses which I urge you not to ignore. Even if you accept Judge Nixon's version of his involvement in the drug case, rather than the version described by Ingram, Fairchild, and Holmes, you should vote to remove him from his bench. For when Judge Nixon was confronted and given full opportunity to describe his version of what occurred, he repeatedly lied. First in his FBI interview, then later in the grand jury. Not once, not twice, but over and over again.

There is no question that the statements charged in the articles of impeachment are false.

Federal investigators, and later a Federal grand jury, were trying to find out what Judge Nixon knew about the *Drew Fairchild* drug case. And even under his own, stilted version of the events, Judge Nixon knew plenty. He had talked with the defendant's father. He learned that Drew was guilty, and that another man was too. He heard Fairchild complain about unequal justice. Then Judge Nixon talked with the prosecutor about the case. He heard about Drew's plea bargain. He then spoke on the phone with Fairchild again. Fairchild thanked him for speaking with Holmes about the handling of the case. Judge Nixon admits all this occurred.

Judge Nixon's conversations with Wiley Fairchild and Bud Holmes, even if they occurred just as Judge Nixon described them to the Impeachment Trial Committee, were about the *Drew Fairchild* case. Everybody agrees.

Wiley Fairchild emphasized that he talked with Judge Nixon about the drug case. In his Senate testimony, Fairchild firmly put to rest any notion that the judge talked about blackmail without mentioning the drug case. Bud Holmes stated that he and the judge talked about the case. Judge Nixon in his own testimony conceded that Fairchild's complaint of blackmail was about the handling of the drug case. Judge Nixon conceded that the case was the subject of his conversation with Holmes. By stipulation, the judge conceded that Fairchild thanked him for speaking with Holmes about the handling of the case.

Given the obvious, that Judge Nixon indeed had contact with Holmes and Fairchild about the *Drew Fairchild* case, what are we to make of the 14 statements at issue in the articles of impeachment? I urge you to consider the statements carefully.

Judge Nixon told the interviewers and the grand jury that he never discussed with Wiley Fairchild anything about his son's case.

Wiley never brought up his son's case. He did not even know Drew existed, except what he had read in the newspaper. Nothing was ever mentioned about Wiley's son. He never heard about the case. Holmes never talked with him about the case. He never discussed the case with Holmes. He knew of no reason he would have met with Wiley after the transaction was finalized. He had nothing whatsoever unofficially to do with the case. He never had a thing to do with the case at all. And he never talked to anyone, including the State prosecutor, about the case.

Everyone agrees that Judge Nixon is a cautious man who chooses his words carefully. These statements are totally false. But were they deliberately false or simply a series of unfortunate but honest blunders?

The question is one of intent. Questions of intent are never easy to answer. We cannot give Judge Nixon truth serum or peer into his mind to find out what he was thinking at the time he gave those statements. Instead, we have to look at the objective evidence.

Did Judge Nixon remember the events at the time of his interview and grand jury testimony? That is the critical question. If he remembered, there is no way to justify his interview answers and grand jury testimony, even under his own version of the events. If he was aware of his contacts with Holmes and Fairchild at the time of his interview and grand jury testimony, he must have intended to deceive. Even his diluted version of the events is completely at odds with what he told the interviewers and the grand jury.

Mr. President, in the House proceedings and at his criminal trial, Judge Nixon admitted that he was aware of his contacts with Fairchild and Holmes at the time of the interview and at the time of his grand jury testimony. Judge Nixon admitted that he remembered. Mr. Cardin will be going over Judge Nixon's prior testimony in much more detail. But I cannot stress this point enough.

Up until the Senate trial, Judge Nixon took the position that he remembered the events. He remembered the events but did not disclose them. Why? Because he thought it did not rise to a legal of a "discussion," because he thought his conversations were about blackmail and not about the drug smuggling case, because he thought it would have been irresponsible to blab about a rumor. That was his position. He remembered, but he chose not to disclose.

Then before the Senate committee, Mr. President, Judge Nixon completely reversed his position. He now claims that he would have spoken up about his contacts with Holmes and Fairchild but he simply forgot about the events at the time of his interview and grand jury testimony. This reversal of position is astounding. I sincerely hope you appreciate what occurred during the Senate trial. The convicted perjurer lied again in an effort to duck the impeachment charges before the Senate today.

When you think about it, Judge Nixon's claim that he forgot the facts when he was in the interview and in the grand jury room makes no sense. Put yourself in Judge Nixon's shoes. You are interviewed for over an hour by law enforcement officials; questioned repeatedly about your contacts with Holmes and Fairchild. You deny any knowledge about the drug case over and over again. After the interview, you immediately call up Holmes and Ingram. Over the next 3 months, the investigation is constantly in the press and constantly on your mind. You search your files for documents and meet with counsel. You read the interview transcript. You see all of your denials in writing. You want the investigation to go away, so you carefully prepare a written closing statement in anticipation of your grand jury testimony. And then you testify before the grand jury. Again you are questioned about the drug case. Again you deny talking with anybody about the case.

Judge Nixon's position defies the imagination. Can we really believe that over this entire 3-month period, from his first denial in the interview, to the end of his closing grand jury statement, Judge Nixon completely forgot about these events? Would Judge Nixon forget about his meetings with Holmes and Fairchild? Would he forget what he learned about the drug smuggling case? Would he forget about a claim of blackmail against one of his best friends? Would he forget events that he admits gave him feelings of shock, embarrassment, and discomfort? Of course not.

Mr. President, Judge Nixon claims he did not remember the events until he and Bud Holmes discussed the investigation in the judge's car after dark in a parking lot; one of those interesting little meetings between Judge Nixon and Holmes that led the fifth circuit, in its appellate opinion, to conclude that Judge Nixon intended to cover up his involvement in the drug case. Once Judge Nixon had his memory refreshed by Holmes, did he come forward to clear the record? The answer is "no." And why did he not? Why did he not step forward once the truth dawned on him? Well, Judge Nixon has an answer. It is not a very good one. He told you that his courthouse had been turned into a KGB or Gestapo headquarters. We know that is not true. The foreman of the grand jury, David Ward, testified at Judge Nixon's trial and said that the grand jury would have been very happy to hear from Judge Nixon. The Department of Justice issued a public statement, exhibit N-15 from the House proceedings. The Department of Justice assured the public that Judge Nixon was not yet accused of any wrongdoing, even after Wiley Fairchild admitted giving Judge Nixon a gratuity. Please read this press statement. This was no witchhunt.

More than 6 months passed from that curious meeting after dark between Holmes and Judge Nixon in the parking lot to the day that Judge Nixon was indicted—6 months, ample opportunity to step forward and clear the record, if Judge Nixon wanted to.

But Judge Nixon did not come forward to tell the truth because he never intended to. His clear intent, from the day of the interview until the day he was indicted, was to hide the truth, to hide his unseemly involvement in helping to fix a drug smuggling case because he was, to use his own words, embarrassed and disgusted by what had occurred. Again using his own words, no wonder Judge Nixon felt caught in the middle and wanted to get out of the situation as fast as he could, because he knew a Federal judge had no business being involved in such a matter.

Once he was indicted, of course, Judge Nixon could no longer give the same denials he had given during the interview and to the grand jury. At his criminal trial, he listened to all the witnesses testify and then Judge Nixon took the stand. He could no longer deny any knowledge of the drug case. Three witnesses said he was involved in the drug case, so he concocted a cream-of-wheat version of the events for the jury and called his friends Holmes and Fairchild liars. He could not call Ingram a liar because Ingram exonerated him on the gratuity charge, so he just hoped that the jury would forget Ingram's description of that important telephone conversation when Judge Nixon confessed to influencing Holmes in the drug case.

Mr. President, a word about Bud Holmes and Wiley Fairchild. Judge Nixon would like to have you believe that the House's case lives or dies with Holmes and Fairchild. That is simply untrue.

Certainly Holmes and Fairchild are no paradigms of virtue. They are convicted felons. They are men that Judge Nixon chose as his friends.

After indictment, both Fairchild and Holmes admitted their crimes and pled guilty. Both men agreed to cooperate with the Government and testify truthfully. In their testimony before the Impeachment Trial Committee, both men told the same story they told the House during its proceedings and that they told the jury.

Judge Nixon claims that Fairchild and Holmes are both lying but who has a greater motive to lie—Holmes and Fairchild, who are friends of Judge Nixon, who have nothing at stake in these impeachment proceedings and nothing to gain by lying now, or Judge Nixon, who wants to remain on the bench and continue to collect his salary?

And what are these men supposedly lying about? Wiley Fairchild's version of his meeting with the Judge and the telephone call is almost identical to Judge Nixon's, except for who placed the call and the date when the events took place. Why lie only about these details? And when you step back, Judge Nixon and Bud Holmes agree that their conversations took place. They only disagree on the details. Are these two men really trying to frame their friend, Judge Nixon?

You should be cautious about Fairchild and Holmes. You should look for corroboration. That is why Carroll Ingram is important. Review his House and Senate testimony carefully. When he finishes praising his friend Judge Nixon, Ingram confirms that Judge Nixon put in a good word for Drew, just like Holmes said. Ingram confirms that Judge Nixon's involvement took place before Drew's drug case was passed to the file, just like Fairchild and Holmes said. Ingram confirms that Judge Nixon talked with Holmes about the drug case, just like Holmes said. He confirms that Judge Nixon influenced the case and took credit for helping Drew. Judge Nixon never attacks Ingram's credibility. Ingram's testimony is unchallenged.

So I have to emphasize that this is not a case of one witness against Judge Nixon. Or two. Or even three. There are four key witnesses that prove Judge Nixon is a liar. Fairchild, Holmes, Ingram, and the judge himself. For Judge Nixon, by his own testimony proves the falsity of his interview and grand jury statements. It is simply impossible to reconcile Judge Nixon's version of the events with his interview and grand jury statements. His explanations and defenses are contradictory, and make no sense.

In his brief, Judge Nixon complains that we are holding him to a standard of testimonial perfection. This argument is almost comical. Is it too much to ask that a judge tell the truth? Is it unfair to require a judge to respond truthfully in an interview with law enforcement officials when he is asked whether he knows anything about a drug case? Is it too much to expect a Federal judge to tell the truth in sworn testimony before a grand jury?

In his brief, Judge Nixon says he had no motive to lie. He says there was no good reason for a Federal judge to lie. But, of course, there is never a legitimate reason to lie. A lie never makes sense, when viewed in retrospect. No crime ever does.

But there is ample evidence of motive here. It does not take a genius to understand what was going on in Judge Nixon's mind, when he denied ever talking to anybody about the drug case, over and over again, often voluntarily when the question did not call for a denial. Judge Nixon did not want to reveal what he had done for Fairchild, in return for the investment and the hope of further deals. If you believe Judge Nixon, he was embarrassed and disgusted about being a messenger in the drug case. If you believe Holmes, Fairchild, and Ingram, Judge Nixon helped to fix the drug case. Under either scenario, Judge Nixon wanted to get the investigation off his back, and did not want the public to know what had happened.

Our judicial system rests upon the notion of truth. A Federal judge must decide the credibility of witnesses, and find the truth in cases that come before him. The evidence before you is clear. Judge

Nixon has no idea what truth is. He does not deserve the high privilege of sitting on the Federal bench.

I believe that when you carefully review the evidence, you will agree that Judge Nixon must be removed from office. The people of Mississippi and the Federal judiciary deserve far better.

Mr. President, the gentleman from Maryland [Mr. Cardin], will conclude this part of the House managers' presentation.

The President pro tempore. Thank you, Representative Sensenbrenner.

Representative Cardin will now conclude the opening arguments of the House.

Mr. Manager Cardin. Mr. President, on behalf of all the House Members and our counsel, we want to thank you for the courtesies that have been extended to us during these entire proceedings as the House of Representatives and the Senate of the United States carry out the awesome responsibility of impeachment under the Constitution of the United States.

Mr. President, I also want to thank you for the privilege of appearing before you today.

I intend to supplement the comments that have been made by Mr. Edwards and Mr. Sensenbrenner by covering three points. First, I want to answer the renewed motion that has been filed by Judge Nixon in regards to dismissing article III of impeachment. I intend to answer the mischaracterization of our recent amendments to articles II and III of impeachment. Neither of these two items, quite frankly, are particularly troubling. But then I intend to focus on something that is very troubling indeed.

My third point: That is Judge Nixon's complete flip-flop on the critical question of whether, at the time of his interview with Federal investigators and 3 months later during a grand jury testimony Judge Nixon was aware of his conversations with Wiley Fairchild and Bud Holmes concerning the *Drew Fairchild* drug smuggling case.

Let me first turn to the motion to dismiss article III. Judge Nixon does not like article III. It is easy to understand why. Article III demonstrates how Judge Nixon has lied. It is important to point out that during the criminal trial Judge Nixon crafted a narrow, semantic distinction in the vain effort to defend the first-degree charges that are now before you in articles I and II.

He lied to the grand jury. He argued that his conversations with Holmes was a "discussion," that a conversation is not a "discussion," and tries to bring out the semantic difference. He claimed that a dialogue with Holmes and Fairchild was about blackmail in connection with the drug case, not about the case itself—in other words, semantic defenses, trying to say he did not understand that when he was talking about blackmail it was the same thing as talking about the case.

The jury saw all the transparency of these neat little distinctions. But Judge Nixon hoped that he could persuade Congress to buy what the jury would not.

So he came before us in the House well rehearsed after the criminal trial, and he again argued semantic defenses. But we took a fresh look at the evidence during the House proceedings. We were not bound by the jury verdict or by the criminal charges that were brought by the Department of Justice. We looked closely at the evidence. We were struck by the ominous contradiction between Judge Nixon's own version of the events and so many of his interviews and grand jury statements.

We noticed that even as Judge Nixon so carefully missed words to avoid admitting perjury in the statements which put him in prison by his own testimony he proved a falsity of other statements he made during the interview and before the grand jury, statements like Wiley Fairchild never brought up his son's case, nothing was ever mentioned about Wiley Fairchild's son, that Judge Nixon had never heard about the drug case, that he did not even know Drew existed except what he read in the newspaper.

Judge Nixon wants you to dismiss article III, so he does not have to defend all of these additional statements that by his own testimony have been proven false. Article III is perfectly proper and worthy of your careful attention. Judge Nixon argues that article III is unfair, that we have taken the statements out of context. We encourage you to review all the transcripts, to look at all the statements, and to listen to the tapes.

We believe that after a careful reviewing you will find that his claim has no merit. The House has not dreamed up Judge Nixon's lies. He made the statements at issue. Read and hear for yourself.

Judge Nixon argues, in his brief, that you must find all 14 statements to be false to vote guilty on article III. But that is untrue. Read the article closely. The question posed by article III is did Judge Nixon conceal information. Did he conceal information, first by one or more false or misleading statements in his interview, and then by one or more false or misleading statements in his grand jury testimony?

You need not find all 14 statements to be false. The House is unanimously convinced that all 14 are complete and utter lies. We hope you will agree. But after considering the evidence, perhaps you will conclude that only 12 of the statements are false. It really does not matter. Just one intentionally false or misleading statement in the interview, or one in the grand jury, should be enough. Because if you conclude that Judge Nixon concealed information, whether by 1 false statement or by 14, he should be removed from the bench. You should vote guilty on article III.

And you need not necessarily agree on which statements are false, if you reach the conclusion that he concealed information. If two-thirds of the Senators present believe Judge Nixon lied, regardless of how each individual Senator reached that conclusion, he will properly be removed from office. Article III charges Judge Nixon with one offense; he lied and concealed information through false and misleading statements in an interview in his grand jury testimony. That article takes the totality of his conduct so that you may judge him.

This is by no means unfair to Judge Nixon, for even if you might differ on which particular statements are lies, the bottom line is that two-thirds of you will have agreed that he concealed information, rendering him unfit for office. That is what the Constitution requires.

There are other points that Judge Nixon has raised in his motion that we have responded to in our brief and we will let the brief speak for itself.

Let me now turn to my second point, and that is Judge Nixon's mischaracterization of the amendments to articles II and III. Judge Nixon's brief gives you the impression that the amendment is both unfair and a change of monumental proportions. Nothing could be further from the truth.

Let me return for a moment if I might to the criminal trial where Judge Nixon was convicted of the second count of perjury, in part for the following statement to the grand jury about the Drew Fairchild drug case. That statement was as follows:

> I never handled any part of it, never had a thing to do with it at all, and never talked to anyone, State or Federal, prosecutor or judge, in any way influence anybody with respect to this case.

At his criminal trial, Judge Nixon stipulated that he used the words "in any way influence." However, during the trial before your committee, Judge Nixon retracted his prior stipulation. His lawyers claimed, in fact, he used other words.

We wanted to be fair. We listened to the tape, and quite frankly we could not tell. So we sent the tape to a linguistics professor at Georgetown who had sophisticated sound equipment. We discovered that Judge Nixon really used the words "that in any way influenced anybody." instead of "in any way influence anybody." A minor change. A meaningless change. But a change nevertheless.

So the House stipulated to this change before your committee. Then we amended articles II and III and wanted to make sure that the changes conformed exactly to the evidence presented at trial. But it makes no difference whether Judge Nixon said he "never talked to anyone, in any way influence anybody," or whether he said, "he never talked to anyone, that in any way influenced anybody."

The fact is Judge Nixon talked to Fairchild and Holmes about the case and influenced both men.

Judge Nixon grand jury statement was false. It was an effort to coverup, pure and simple.

I want to turn now to the third issue that has become a very important issue in this case and that is whether Judge Nixon was aware of his contacts with Bud Holmes and Wiley Fairchild at the time of his interview before Federal investigators and the time of his grand jury testimony.

As Mr. Sensenbrenner pointed out, it is hard to believe that over a 3-month period from the start of the interview to the time of his grand jury testimony, Judge Nixon forgot about events that many described as embarrassing and shocking. That is a key question. Did he remember the 20-minute meeting with Fairchild when Fairchild complained of unequal justice in the drug case, when Fairchild complained that Judge Nixon's old friend Bud Holmes was blackmailing him in connection with the case? Did he remember his meeting with Bud Holmes, when he and Holmes talked about the case? Did he remember the telephone call to Fairchild from the farm, when he told Fairchild the case would be taken care of to Fairchild's satisfaction and Fairchild thanked him for speaking with Holmes about the drug case? Was he aware of any of these events during the interview or during his grand jury testimony?

If you find that Judge Nixon did remember, if you find that he was aware of these events, then you must remove him from office.

This is painfully true, even if you believe Judge Nixon's version of the events instead of Fairchild, Holmes, and Ingram, for no honest man would answer as Judge Nixon did in the interview if he remembered those events. No honest man would testify as Judge Nixon did before the grand jury, if he remembered those events and no honest man would change his recollection after trial and after his hearing before the House and his hearing before the Senate.

Did he remember?

Mr. President, let me refer to Judge Nixon's own testimony. What does Judge Nixon say? During his criminal trial, Judge Nixon repeatedly testified that he was in fact aware of his contacts with Fairchild and Holmes, both at the time of his interview and during his grant jury appearance. Let me read from the trial transcript.

A question by Judge Nixon's counsel:

> While you were in there [testifying before the grand jury], did you in fact were you aware of the fact that there had been a discussion between you, excuse me, there was a meeting where you were over at Wiley's office and then you had been at Bud's farm that evening and the phone call. Were you aware of that when you were in the grand jury?

Answer by Judge Nixon, "Yes."

A few minutes later, Judge Nixon said it again:

> Q. "(By Judge Nixon's Counsel). I want to ask you another question. You told us that you went to that grand jury or when you were at the grand jury you were aware that you had seen Wiley on a night several years before or I should say an afternoon that you were at the farm and passed on the blackmail complaint of Wiley's to Bud Holmes, right?
>
> A. (By Judge Nixon). Right.
>
> Q. And that Bud then made a phone call to Wiley which surprised you but it did occur, correct?
>
> A. Yes.
>
> Q. And you're in the grand jury. Were you aware at that time that you remember those events?
>
> A. Yes.

What could be clearer? His own statement that he recalled these events when he was before the grand jury and during the interview.

What about the interview? Did Judge Nixon also remember the events at the time of the interview? Again let me go back to his testimony at trial.

> Q. "(By Mr. Weingarten). Did we not discuss the *Drew Fairchild* case in great detail [during the April 1984 interview]?
>
> A. (By Judge Nixon). You discussed all 3 matters.
>
> Q. Including Drew's case?
>
> A. Yes.
>
> Q. In your mind at that moment did you recall the allegation by Wiley Fairchild?
>
> A. What allegation?
>
> Q. About Bud Holmes blackmail.
>
> A. Complaint?
>
> Q. Yes.
>
> A. Yes.

Again, Judge Nixon states that he did recall when the question was specifically asked him at trial the conversations during his interview with Federal investigators. The question was clear as a bell: "In your mind, at that moment in the interview, did you recall the blackmail allegation?" And the answer was "yes."

During his criminal trial, Judge Nixon was also asked whether he recalled meeting with Fairchild at the time he told the grand jury he did not know any reason why he had met with Fairchild after the investment was finalized in early 1980. That specific statement is at issue in article III(2)(B).

Judge Nixon answered, "I knew that, yes."

Of course, he remembered the meeting with Fairchild when he gave the grand jury testimony.

At the close of the criminal trial, the jury was given the following instructions by the court to summarize Judge Nixon's defense. This is the trial court judge's comments in his instructions to the jury:

> With respect to the perjury charges contained in Counts Two, Three and Four, Judge Nixon contends that at the time he appeared before the grand jury and gave the answers which form the basis of the perjury charges that * * *. He was aware that he had had a conversation with Wiley Fairchild in which Fairchild complained that he was being blackmailed by Bud Holmes, and possibly Carroll Ingram, due to the publicity coming out of his son's case; and
>
> He remembered mentioning Fairchild's blackmail allegation to Bud Holmes, but they did not discuss the *Drew Fairchild* case.

There is no doubt about Judge Nixon's position at trial. He remembered. Then Judge Nixon testified before the House. In his House testimony, Judge Nixon never once suggested he forgot about his contacts with Fairchild and Holmes at the time of his interview and grand jury testimony. Instead, he expanded on his prior defense. Judge Nixon told us that he deliberately did not volunteer this information, because he thought it would be quote "irresponsible" to "go around blabbing" about Fairchild's blackmail complaint to the grand jury. He never said it slipped his mind. He never said he forgot about the events. He said he deliberately chose not to volunteer the information.

Up to the time that he appeared before the Senate, he remembered when he was before the grand jury and when he was before the interview. But then he changed his story when he appeared before the Senate, completely changed his story. Now he claims he forgot; almost no recall of the events during his interview and grand jury appearance. And it is his only defense now, for he told the Impeachment Trial Committee that if he has remembered, he surely would have revealed the facts, if he remembered, he would never have made the 14 statements. Unfortunately, he just plain forgot. Yet, he told the trial court and told the House that he did remember.

How could he have volunteered information if he had forgotten? How can you possibly reconcile Judge Nixon's own contradictory testimony? He tells you he has completely forgotten. At the trial, he told the jury, in my mind at that moment in the interview, I remembered. When I was in the grand jury, I was aware of the events. I remembered.

Oh, Judge Nixon's lawyer tries to be very crafty. In his brief, he says it is outrageous for the House to point out this glaring change in testimony. He tries to create a distinction between being aware of something at a particular moment and remembering it, but also at the same moment forgetting it. He has to argue something. He knows his client has been caught red handed.

Quite frankly, when I first heard of the change during the Senate hearing, I was surprised. But then, reflecting upon the types of defenses that the judge has raised during the proceedings, it should be no surprise at all.

Judge Nixon's argument on this point is like so many of the defenses he has raised in this case. Hollow and, frankly, quite sad. He was aware and remembered, but forgot. His contact with Holmes was not a discussion, only a conversation. His contacts with Holmes and Fairchild were about blackmail in connection with the drug case, not about the drug case.

Then he grasped for bigger straws. I am the victim of vindictive prosecution because of my ruling in a condemnation case, he says in his first defense of the impeachment charges. But there is not a shred of evidence supporting this claim. Then he completely abandons the defense. He says John Baltar will tell the Senate how the Department of Justice manipulated witnesses to lie to get him. But Baltar, a man who would not even admit under oath during post-conviction proceedings that he is Judge Nixon's good friend, is never called to testify before your committee.

Judge Nixon tries to defend his action by saying, "My involvement in the drug case was not material to the grand jury investigation," a defense so thin he abandoned it during the court proceedings after it failed at trial; a defense he destroys by admitting, in answer to article I, that his conversation with Holmes was, in fact, relevant. Another defense he used was, "I was trapped by prosecutors into committing perjury," even though he was convicted because of his answer to a simple question, and that question was, "All right, Judge. Do you have anything you want to add?" Being trapped by that type of question?

He knows how weak these defenses are. He has to come up with some more.

Why did the prosecutors not use the magic word "blackmail?" If they only asked me about blackmail, suddenly the facts would have dawned on me, and I would have rejected the 14 denials.

But why should the prosecutors use the word? They did not know Fairchild had complained to Judge Nixon about anything, much less blackmail in connection with the drug case. Fairchild did not tell them. Judge Nixon certainly did not tell them. And, of course, what really ruins his defense is the single fact that even when Judge Nixon supposedly remembered the events, he still did not come forward to correct the record.

Why not? He has to invent another defense. "I couldn't tell the truth once I remembered," he said, "because the courthouse was like Gestapo headquarters."

So many defenses—the last of which, "I forgot"—all of them so hollow.

Members of the Senate, the evidence before you is overwhelming. Judge Nixon helped a drug smuggler. Judge Nixon lied about his involvement in the drug case during the investigative interview. Then he lied again in sworn testimony before a grand jury. After lying, he tried to cover up his involvement in the drug case, but was unsuccessful. In an effort to escape the further charges, he concocted a version of events that is simply untrue. Most recently, in his testimony before your committee, he lied again.

The House has established and proved the validity of each of the three articles of impeachment. We thank you for your careful attention to the case and for your patience during our argument today. To maintain public respect for the law and preserve the integrity of the Federal judiciary, we urge you to remove this man from the bench.

Mr. President, we reserve the remainder of our time.

The PRESIDENT pro tempore. Thank you, Representative CARDIN.

The House managers have 22 minutes and 19 seconds remaining.

The Senate will now hear argument on the pending motion and final argument on behalf of Judge Nixon by both Judge Nixon and Mr. Stewart. Judge Nixon asked to be first.

Judge Nixon, please proceed.

Judge NIXON. Mr. President, Members of the Senate, it is with mixed emotions that I stand before you, my judges and jurors, to seek your careful and objective consideration of the evidence and your vote based upon that evidence or lack of evidence.

By mixed emotions, I mean on the one hand, frustration and outrage, which flow from my knowlege that I am innocent of the charges of which I stand wrongfully convicted, and, on the other hand, the hope of vindication afforded by the constitutional safeguard and privilege of a de novo or new trial.

I believe that the framers of the Constitution foresaw exactly the very events which are involved here. They, therefore, devised and instituted this impeachment procedure, both to protect the individual rights of those who are selectively prosecuted after having been targeted by overzealous prosecutors, and to protect the independence of the judiciary and ensure the separation of powers, the very touchstone of our democracy.

I am certainly mindful of the fact that I have served and am still serving time in incarceration as a result of a conviction. However, we are assured that, by your oath, you have sworn to decide my innocence or guilt independently of the result of the criminal trial, based solely on the evidence or lack of it.

We all know that a criminal conviction does not remove a Federal judge or certain other Federal officials from office, but that this is the sole prerogative of you, the U.S. Senate, following a new and independent impeachment trial.

Despite this constitutional guarantee, some of you may say or think that something is wrong; that is, that a man convicted and serving time should not be a Federal judge. There is something wrong with this situation, but what is wrong is that I am paying a debt that is not owed. I have committed no crime.

I have been unjustly and wrongfully convicted. Otherwise, I assure you that I would have long ago resigned and not subjected my wife and children to this emotionally physically and financially draining ordeal.

I very much value the integrity of the Federal judiciary. I have done nothing to impugn the integrity of this great branch of Government and would do nothing to impugn it.

Your grave and important responsibility is unique, and one which you are rarely called upon to exercise. It is not a political or legislative duty, but, rather, a judicial one. You are called upon to put aside political considerations and to impartially consider all the evidence before you, independently of any other proceeding that has previously taken place, and decide my innocence or guilt based solely on this evidence. And that is what we ask you to do.

If you find that the prosecution has clearly met its heavy burden of proof, whether it be proof beyond all reasonable doubt or by clear and convincing evidence, then you may vote to convict. If you have a reasonable doubt of my guilt, applying whichever standard you apply, then you are obligated to acquit. And this relates to each of the three articles of impeachment considered separately.

But, whatever the standard of proof, the heavy burden is on the prosecution, as it should be, when, as here, we are concerned with very precious constitutional rights. The investigation of my case was begun on false premises, and pursued for the wrong reasons. From the very beginning, the goal of the Federal prosecutors was to get the Federal judge no matter what it took. And it took plenty—threats of indictments of some, and indictments of others on charges which the prosecutor later admitted before the House subcommittee that he probably could not have proved. Then, following these indictments came promises, threats and deals with the witnesses. The basis for the investigaton was the charge that I received some illegal benefit in return for my actions as a judge.

There never was any basis for that charge and I was acquitted of it. In fact, during my trial the prosecutor told two newspaper reporters covering the trial that he probably could not prove the illegal gratuity charge and, after the trial, he admitted to another reporter that he had not proved that charge.

By including that false allegation, however, the prosecutor was able to taint the trial, to taint my character before the jury and secure the compromise verdict of conviction on two of the four charges against me.

You may well wonder what our basis is for saying that I was not afforded a fair trial. First, I would not have been convicted had the jury not been prejudiced against me by the prosecution of the unfounded, and unsupported, illegal gratuity charge of corruption.

Second, I would not have been convicted if the jury had known that one of the two principal prosecution witnesses, Wiley Fairchild, gave false testimony against me at my trial in order to please the prosecutor and benefit himself, as he later admitted in the postconviction hearing before the U.S. District Court in Jackson, MS, last year. He now tells the Senate committee he does not remember that testimony. He does not remember anything that took place during the postconviction hearing last year.

I stand before you as a man convicted of perjury on the basis of admittedly perjured testimony.

Third, while testifying before the House subcommittee and also here before your trial committee, Bud Holmes, the State district attorney, the second of the two principal prosecution witnesses, finally acknowledged that when he tried to discuss the *Drew Fairchild* case with me at his farm on the night of March 11, 1983, the night in question, that I prevented him from discussing that case with me when he attempted to tell me about it that night. Those are his words. Twice he testified to that before the House subcommittee and before your trial committee. That goes directly to count 1.

Of course, he has always admitted that he moved to pass the case to the files, that is, place it on the inactive docket, and that is all he did, of his own volition; that I told him I did not want him to do anything to help Drew Fairchild. Those are his words. And that the passing to the files was a meaningless act that did not affect the disposition of that case. And it did not, as Mr. Stewart will tell you and show you.

In fact, the only person who helped the drug smuggler was Drew Fairchild, the Federal prosecutor, in order to get me. And Mr. Stewart will cover that.

In addition, since my criminal trial other facts have been discovered that we did not know at trial. First, scripts were prepared for Wiley Fairchild by the Federal prosecutor and John Baltar, Mr. Fairchild's employee, so that he could learn his false testimony against me at trial, which he later, at the postconviction hearing in Jackson, admitted was false. Second, promises of favorable treatment that we have since discovered were made to Wiley Fairchild, which will be covered in detail by Mr. Stewart. And, third, a telephone message record from Bud Holmes to me on March 11, 1983, at my chambers in Hattiesburg, MS, confirming my statement and my testimony that the blackmail conversations occurred on that particular date. See exhibit 17.

We did not have any of this evidence at trial nor did we have Wiley Fairchild's admission under oath that he had perjured himself in testifying against me at trial to please the Federal prosecutor.

It is also important for you to know and understand what I am not accused of here. And, believe me, if they could have accused me of it they would have done it, if they could have proved any of it.

I am not accused of any corruption. I am not accused of any malfeasance. I am not accused of any substantive crime. I am not accused of giving any false testimony at my trial or before the House subcommittee. I am not accused of any ethical violation.

What I was wrongfully convicted of, and am charged with and accused of here, is lying to cover up my innocence—perfectly innocent acts, which certainly would be nonsensical and stupid, to say the least.

You would not know this by listening to the House managers' argument today, and reading their briefs. It is important that you recognize their strategy of trying to make me look like a corrupt judge, which I am not. They do so to bolster what they must recognize as weak and unfounded impeachment charges. Please, do not let them get away with this. If they could prove any of these matters, they would have charged them in the articles of impeachment. And I think you know that as well as I do.

Time constraints do not permit me to state to you in as much detail as I would like all that I wish to say. But I do want to address you concerning how these charges against me were created.

On the 19th of April, 1986, I freely gave the recorded interview, without any prior notice, to Mr. Weingarten of the Public Integrity Division of the Justice Department, and Mr. White-Spunner, of the FBI, and thereafter requested the right to appear before the grand jury without subpoena, without being asked to come. I requested that right, which was granted.

I did so because I had nothing to hide. I had not engaged in any illegal act. And that has been proved to be true here because I am not charged with any illegal act prior to that time, and was acquitted of the illegal gratuity charge which they admitted they could not have proved but they went forward with.

It is undisputed that at the inception of this interview before the tape player was turned on, the prosecutor told me the interview and the investigation which prompted the interview was to determine, one, the handling of Mr. Fairchild's 50-year-old son's, Drew Fairchild, drug smuggling case on the Federal level; that is why it was not prosecuted in Federal court by the U.S. attorney but, instead, was transferred to Bud Holmes, the local district attorney, to prosecute in State court and, two, the relationship, if any, between the drug case and the oil interests which I purchased from Mr. Fairchild. That information framed my understanding of the investigation throughout my grand jury testimony as well.

Between the time of my interview in April and the convening of the grand jury in July 1984, based upon leaks from informed sources, the news media had a field day at the expense of me, my family, and the Federal judiciary. Every time one turned on the television, listened to the radio, or picked up the newspaper, there was the big news of me, a U.S. district judge, being investigated for bribery in connection with a drug smuggling case. There were pictures and descriptions of the mineral conveyance deeds, the compilation of royalties received, descriptions of the drug case, and interviews with Weldon Kennedy, the FBI agent-in-charge in Mississippi, concerning the parallel investigation before this same grand jury of my handling of the Petit Bois Island condemnation case, which the Government was displeased with. I was indicted and convicted by the news media before I testified in the grand jury, and actually before it was ever convened.

Never was there ever any mention in the news media at any time of the blackmail complaint made by Wiley Fairchild which really related to the dragging of the Fairchild name through the news media. That is what he meant by blackmail. Apparently the authorities felt it was without substance and not worth exploring or pursuing. They did not ever ask me one question about it. If it was material or of any significance, why did the prosecutors not question me about it in my interview or before the grand jury when the charge and allegation had been made to the FBI by Wiley Fairchild just 8 days before my interview? Why did they not ever question the accuser, Wiley Fairchild, or the accused, Bud Holmes, about it at any time when they testified before the grand jury or at any other time?

During the interview and my grand jury testimony, I did not think of these blackmail conversations, probably because I remembered them as relating to blackmail and not Drew's case. Of course, there was some tie between blackmail allegations and Drew's case, but that is not how I remembered the conversation. Indeed, I did not even think to mention blackmail conversations to my own lawyer, as I so testified at trial, and I surely told him anything that was material to the investigation. I was focused on answering the corruption charges that were all over the news media, and there never has been any credible evidence to support those corruption charges.

I need to speak here to you about the one aspect of these Senate proceedings that has angered me and disappointed me greatly. I cannot understand and will not let go unchallenged the misrepresentation of my testimony that has occurred. I have always testified that during the interview and before the grand jury I did not think of the blackmail conversations that consumed probably no more than 30 minutes of my life in March of 1983. I did not ever say, and I could not ever say, that I forgot these blackmail conversations entirely. After all, when I was reminded of them in 1985 by Holmes, I remembered them immediately. I do not know why, but those blackmail conversations, though somewhere in my mind, did not occur to me during the interview and grand jury appearance. That was my testimony at trial; that was my testimony before the House subcommittee; that was my testimony before the Senate committee. Please look at our brief with respect to this at pages 18 through 25 that is before you where we made that crystal clear by pointing our portions of my prior testimony that are left out of the House manager's brief and are left out of their argument made to you here today.

Let me read you some of what they omitted. At trial, at page 1576 of the transcript, I was asked:

> At the time of this interview [in April 1984], at the time you were on the phone with Ingram, Phillips, Holmes, was the telephone call anything that you even thought of at that point in time? Answer: No.

And before the House subcommittee at page 443 of the printed volume:

> Question: Now at the time you gave that interview with Mr. Weingarten—and this is April of 1984—were you aware, at some level, that you had this previous conservation you have described in March of 1983 with Mr. Fairchild concerning his blackmail allegation? Answer: Well, of course I knew it had occurred. It was, I am sure, in my recollection, but it wasn't foremost, of course, in my mind.

Again at page 506 of the House hearings:

> You admitted, didn't you, Judge, at the time of this interview, that you did recall, or had it in your mind—you had not forgotten about the conversation with Wiley Fairchild and the subsequent phone call from the farm back to Wiley that evening? Answer: Well, of course it was in my recollect, my mind. I knew it happened is what I mean, but it wasn't foremost in my mind, at all, because of the reasons I've already stated. I thought it was nonsense. I thought it was a misunderstanding. It was apparently cleared up, and over with that evening, and I heard nothing more about it after that time.

That is, has always been, and always will be my testimony and it is there in black and white. It has been mischaracterized by the House managers in their brief and in their argument here. They almost admit to you the credibility of Holmes and Wiley Fairchild is nil, but they ask you to convict me because my testimony has changed. It has not changed one iota from the time of trial or from the time of the House subcommittee hearings, although Holmes and Fairchild's testimony changed every time they appeared before the grand jury and every time they have appeared since then.

You may ask, as Senator Chafee did, and as the House managers alluded to, why I did not volunteer to go back before the grand jury when I was reminded of the blackmail conversations in February 1985. First, of course, I was not subpoenaed back; I was not asked to come back. I did not go back voluntarily on advice of counsel because at that time, we knew that I was the target. I was the big prize as the confidential informant had written to the FBI. I had voluntarily appeared before the grand jury once to explain my innocence of the corruption charge, but still was being investigated despite the lack of evidence of that.

Also by that time, Wiley Fairchild had been induced somehow to plead guilty to giving me an illegal gratuity which I knew he had not done. Indeed, Mr. Fairchild told your trial committee when he testified that he is now suing his own lawyers for malpractice for influencing him and causing him to enter a plea of guilty to that gratuity charge of which he has never been guilty.

In those circumstances, we can see no good reason to voluntarily go back to the grand jury after February 1985, and I think that is a judgment that almost anyone in my position would certainly have made under the circumstances.

You must determine whether I am a witness worthy of your belief. In judging my credibility and in part and criteria as my character and reputation generally and more specifically as it relates to truthfulness and veracity. Every witness who was asked, whether called by the prosecution or defense, testified without equivocation that my reputation for truthfulness and veracity is excellent.

Mr. Edwards in his summation and argument to your committee stated—and I think I could almost quote it:

> Judge Nixon is not a paper shredder. Judge Nixon did not run for telephone booths or leave town. Judge Nixon is a Federal judge with over 21 years on the bench, of excellent reputation.

We could have produced many more character witnesses, but because of time constraints explained to us very clearly by your very patient and capable chairman, Senator FOWLER, we called only five representative witnesses. Not a single character witness, rebuttal witness was called and questioned by the House managers.

Senators, my wife, children, and I have suffered and lost so much over the past 5½ years—our peace of mind, damage to reputation, our ability to be together, and my freedom, but we have not lost faith and trust in God or in our system of justice. We ascribe the wrong that has been done to those who administer the system. We hope and pray that justice and right will now prevail.

We know that it is difficult to look beyond the fact of my conviction to the underlying true facts of this case. We know that it may be politically more difficult to vote not quilty. Many have said that these problems cannot be overcome, but we have disagreed, and we do so now, very strongly. We have great faith that each of you will have the insight and the courage to vote your conscience based upon the evidence.

I have served honorably and faithfully as a U.S. district judge for over 21 years and have always adhered to the advice given to me by my good friend, Senator John C. Stennis: "Judge, keep the courtroom floor level for all who appear therein." I have done that.

I am and have always been mindful of the fact that I was appointed and not anointed. Throughout my life I have tried to serve my country and my community. It causes me great pain to think that my record of public service has been marred and my personal honor and integrity have been questioned.

As a judge I know and respect how important it is that the oath be honored by witnesses. I have tried fairly and honestly and truthfully to answer every question asked of me throughout this entire proceeding. I know in my heart and honestly tell each of you at this time that at no time have I intentionally made a false statement or given a false answer. I hope and pray that you will realize this from the evidence before you. I have persisted and persevered in this fight for justice because I know that I have done nothing wrong. I have committed no crime or misdemeanor.

In closing, I wish to thank you for the opportunity to speak to you today. I have paid a debt that I did not owe by serving 20 months in prison. I ask you now to right this wrong, and I can assure each of you that if rightfully given the privilege of continuing to serve my country as a Federal judge, absolutely can and will do so in the same fair and dedicated way that I have in the past.

May Almighty God give you the courage to vote your conscience and may your conscience guide each of you in your deliberations and vote this week.

Thank you.

Mr. Mitchell addressed the Chair.

THE PRESIDENT pro tempore. The majority leader.

Mr. MITCHELL. Mr. President, in the course of Judge Nixon's remarks, he stated that time constraints prevented him from addressing some aspect of this subject in sufficient detail. It is my understanding that the time was agreed upon by counsel, but I wish to make it clear that in the event the judge or his counsel wish additional time to address this subject, I would strongly urge and he prepared to ask that such additional time be granted today equally to both sides.

I want to make it clear that so far as the Senate is concerned, we wish no party to feel that there has been insufficient time to address any subject before us. And so I merely suggest that at an appropriate time counsel and the judge may consult, and if they wish additional time to address the subject, which the judge has indicated he did not feel he had time to do so, then we are prepared to make such additional time available equally to both sides.

Judge NIXON. May I reply to Senator Mitchell, Mr. President?

The PRESIDENT pro tempore. Judge Nixon.

Judge NIXON. The distinguished majority leader probably misunderstood what I said. I said with respect to some things that I would have liked to have said, I just did not have enough time to say them, I did not think. But I assure you my attorney will cover them, Senator. We had to divide our time. We appreciate very much your offer, and we hope that it will not take any additional time. But certainly we do appreciate the majority leader's offer.

Mr. MITCHELL. I just wish to make that clear if, when you get to the end of your time, you believe that you need additional time to make your case fairly and appropriately, we are prepared to make certain that such additional time is available as you require.

Judge **Nixon**. Thank you, Senator.

The **President** pro tempore. The respondent has 61 minutes and 39 seconds remaining.

Mr. Stewart will now conclude the argument for Judge Nixon.

Mr. **Stewart**. Thank you, Mr. President.

I want to stress two points at the outset that are going to come up throughout my remarks, and they are critical to the case. First, these impeachment charges present a seriously incomplete view of the evidence. You can vote to convict on these charges only if you do not take the trouble to learn the facts. You can vote to convict on these charges only if you pay no attention to what Judge Nixon and I say here today. And you can vote to convict on these charges only if you listen to but one side of the story.

We plead with you not to let this strategy, this prosecution by omission succeed. Look at all of Judge Nixon's testimony, look at all of the facts. The most obvious and the worst symptom of this strategy is the impeachment articles themselves. And during the House managers' presentation today they did it over and over again. They do not present his testimony fairly and fully. They drop off the key words that explain what he was really saying, they take things wildly out of context. There are only three articles of impeachment here. Two of them had to be rewritten.

They would like you to think that that was just a trivial matter. It was not a trivial matter as I am sure you understand. Four hundred and seventeen Members of the House of Representatives impeached Judge Nixon for statements he did not make. There are other impeachment articles still there for statements he did not make which we have not been able to persuade them to change. But that is a big concession.

They tell you of their excruciating care in preparing this case. Where was that care before? We had to complain on every day of the Senate trial that those articles were wrong before we could get them to go and actually listen to them and make sure that we were right. This should be a big red warning sign to you. You are going to have to read Judge Nixon's testimony. You cannot trust those impeachment articles. They are wrong.

A second introductory point. We have made this point and I will come back to it. The House managers do seek to apply a standard of testimonial perfection. The three fact witnesses that they called—Bud Holmes, Wiley Fairchild, Carroll Ingram—all three of them knew about the blackmail conversations.

All three of them were interviewed by the FBI in April and May 1984; all three of them went to the grand jury in July 1984 and none of them mentioned the blackmail conversation; none of them. It did not seem important to them. It did not come to their minds, just like it did not come to Judge Nixon's mind.

They are asking you to incorporate an unfair double standard. I want to do some quick background. The two basic groups of facts that are relevant: First is the oil and gas properties purchased by Judge Nixon and Wiley Fairchild. He bought those properties at the same time he made three other investments through other people he knew. He got lucky on the Fairchild investment. Two of the properties paid off well, the other did not pay off well, and his three other investments did not pay off well. That is what happens with oil investments. Some pay off real well, and some do not pay off at all.

Judge Nixon paid fair value for that investment. Everything was documented. There were deeds executed, every payment was by check, there was no cash anywhere in the case, the transfers were entered in the land records of the State of Alabama, and the land records of the State of Mississippi. He reported them on his financial disclosure form. There was no secret here. There is absolutely a regular transaction. It had nothing to do with Drew Fairchild's case. The testimony is unanimous on that point.

When the Federal investigation started, Judge Nixon had no embarrassment or uncertainty or he did not try to cover up anything about these investments. It was a straight up business deal from the start. After 6 years of investigation, the complete innocence of the transaction has been established. No charges have been brought in this proceeding, and I urge you do not let yourself be distracted by that. That is what it is. It is a distraction. It is not the charge before you in any way.

The other area of factual background is Drew Fairchild's case. There sure are some serious questions about the handling of the *Drew Fairchild* case. Some questionable things happened, but none of them involved Walter Nixon. One of the questionable

So he sued Drew and Wiley Fairchild, though his father paid part of the fee. But Bill Porter was still upset. So he went through his friend, Bud Holmes, and he complained to Drew he had not paid. So Mr. Holmes got this strange idea that he could take over the case, Mr. Holmes, the local prosecutor, and he could indict Drew in the State court. The Federal prosecutors for some reason had not indicted him yet for 7 months. They had not done anything. Maybe that would have helped Drew pay the fee. This is extraordinary. You prosecute a man, indict him to help a friend collect a fee, but that is what Mr. Holmes did.

So he called up the U.S. Attorney and said this is what I am going to do. Let me take over the case, we will help Bill collect his fee. According to Mr. Holmes, the U.S. Attorney said great. That is what happened. He indicted him. And Wiley Fairchild is a funny witness in a lot of ways; if you watched the videotape, he is a hard man to understand. Sometimes he acts like he does not understand anything and sometimes you think he is fooling you. But Mr. Fairchild understood this message and he paid Bill Porter's fee within 6 days of the indictment.

He got that message because Bud Holmes called him to tell him Drew will be indicted. That is a pretty strange thing to do, too. Why do you indict a 50-year-old man and then call his father to tell him you have indicted him, and do not call the defendant. But that is what Mr. Holmes did. That is one of the reasons why Wiley Fairchild thought he was being blackmailed by Bud Holmes.

This episode is a complete perverted injustice. Anybody in this room will recognize it as such. Walter Nixon is nowhere connected to it. There is Bud Holmes. This is their witness.

In January 1982, Bud Holmes cut a deal with Drew Fairchild—no jail time, pay a fine. Mr. Fairchild pled guilty. He went for a back operation in New Orleans, had a lengthy recuperation; nothing happened in the case all through 1982. At the end of the year, though, there is a change in factors. Judge Dickie McKenzie is elected circuit court judge for Forrest County. Bill Porter has a problem now. He supported Judge McKenzie's opponent. Judge McKenzie has been elected on a get-tough program, and Mr. Porter is afraid Judge McKenzie is not going to respect his plea bargain.

We learn a few years later that he was right to suspect that because when the plea bargain came before him in 1985, he did not respect it. He said he would not follow it. So Mr. Porter went to Bud Holmes, his friend, and asked for more help in Drew's case. Mr. Holmes said—this is in December 1982—OK, I will pass it through the files and he passed it through the files. That is what happened. Walter Nixon is nowhere to be found. It is only after all this investigation, it is only after Bud Holmes is under the thumb of the prosecutors that he starts trying to put Judge Nixon in the picture here.

Passing the case to the files is not a defensible action by Mr. Holmes. It is meant for a minor offense. It is not meant for somebody who assisted in the smuggling of marijuana. But he did it for Bill Porter. Again, Mr. Holmes sent the message about this, not to Drew Fairchild. He sent it to Wiley Fairchild. He took the order passing the case to the files and he asked Ingram to deliver it to Wiley. Why is he doing that? That is very strange. That is another reason why Wiley Fairchild thought Bud Holmes was blackmailing him.

At that point everybody thinks the case is closed. This is December 1982, Christmas of 1982. In early 1983, just a few weeks later, Judge McKenzie comes upon this order passing the case to the files. He makes a public comment. The press has a field day. The roof falls in. But Holmes is all over the press, as having done a favor for a rich man. Wiley Fairchild testified that what really bothered him is it looked like he was caught with his hand in the cookie jar, that he had been caught pulling strings to help his boss. He said he had not done that. So in late January, only 33 days after the case went to the inactive files, Drew's case is reactivated. Where is Nixon? He is nowhere in this picture.

We get to the Federal investigation. I have to introduce one person, a man named Skip Jarvis, a young man who married into Wiley Fairchild's family. Wiley paid for Mr. Jarvis' education, gave him a job. Jarvis showed his gratitude by deciding Mr. Fairchild had bribed Judge Nixon and fixed Drew Fairchild's case. He called up the FBI and told them that. He called in an anonymous phone call from a pay phone. He said he feared for his life. He made it seem like it was the worse cesspool of corruption you can imagine down in Mississippi and the FBI fell for it hook, line, and sinker. They started an investigation. He had no evidence of corruption. The prosecutor told the jury at Judge Nixon's trial that Skip Jarvis never had any evidence of corruption. It was a fantasy.

Then in April 1984, the FBI is trying to figure out the first move, how do they start on this big case. Wiley Fairchild dropped out of the sky on them. He reached out to the FBI, right at that point, and he complained to the FBI that he was being blackmailed about Bud Holmes and Drew Fairchild's case. Please remember this.

Wiley Fairchild's first statement to the FBI is "They are blackmailing me, Bud Holmes is blackmailing me." The FBI agent who testified at the Senate committee hearing agreed Wiley Fairchild had blackmail on the brain. That is what he thought was going on all the time.

His allegation was never very precise. I have to tell you it never made a whole lot of sense, but he was convinced of it and he even told the House subcommittee last year, and he still thinks maybe Bud Holmes was trying to blackmail him.

On April 19, 1984, 8 days after Wiley Fairchild made his blackmail allegations to the FBI, the FBI agent and the prosecutor unexpectedly dropped in on Judge Nixon in his chambers. They asked to interview him and to record him.

The critical point I need to make about this interview is Judge Nixon had no warning whatever that the interview was going to happen. He got a phone call from the head agent and they showed up. But he voluntarily agreed to the interview. He did not head for the airport or the pay telephone booth. He did not stall until some later date. He just said, "sure," and he agreed to have the interview tape recorded. He acted like just what he was, a man with nothing to hide.

The interviewers did not ask about the blackmail allegation. Even though Wiley Fairchild made it 8 days ago, even though Wiley had blackmail on the brain, and even though they recorded the conversation between Fairchild and Holmes the day before during which Mr. Fairchild made the blackmail allegation on six separate occasions, they still did not ask Judge Nixon about it.

At the committee hearing, Senator Mack asked the FBI agent: Why did not you ask that question? And I did not hear the answer come back.

Investigators did ask Judge Nixon about two things. They asked about the oil and gas transaction. Eighty percent of the transcript relates to that issue. The FBI was convinced, based upon Jarvis' fantasies, that the date of the transaction had been manipulated to cover up a payoff to Judge Nixon. It was not true, but that is really what they were asking about.

They also asked some questions about Drew's case, how the case got from Federal hands, from the U.S. Attorney, to Bud Holmes. The FBI had told Fairchild a few days after that, that was one of the crucial questions because they thought that was the *quid pro quo*. The payoff had been to get the case out of the Federal prosecutor's hands.

Judge Nixon told him he had no idea that there had ever been a Federal case involving Drew Fairchild. He was interested in this news, and he asked about it, and the FBI agent agreed when he testified that Judge Nixon was very interested in it.

And then there is a final point about the interview. Judge Nixon did not mention the blackmail conversation he had with Wiley Fairchild and Bud Holmes many months before. He did not think of those events. That is exactly what he said at trial.

He has read you the testimony where he said at the trial it is the first testimony he ever gave on this subject. Why did you not remember? The question is, did you even have a thought of it, and his answer was "no."

That was his testimony the first time he testified on the subject, and that is exactly his testimony now. And it is noted as the measure of the weakness of the case against him that they have to go to these lengths to not tell you about that testimony.

Then after the interview, this is April 1984, after that interview comes the gushing leaks from the FBI, the screaming headlines. Even though the investigation was supposed to be secret, it was in the press that Wiley Fairchild had paid off Judge Nixon. It was on the TV news, and it drove Judge Nixon crazy, and he demanded the right to go before the grand jury.

Stop here again. Look what he is doing. He is still not heading for the airport; still not heading for the pay phone booth. He wanted to go to the grand jury and take the oath and tell them what the true facts are.

On July 18, 1984, he was the first witness to appear before the grand jury. It was voluntary in every sense. He had not even been asked informally to appear before the grand jury.

Once again, he was asked about the oil and gas property at great length and dating of that transaction at great length. The first 45 pages of the transcript relate to that, and there is some light questioning about Drew Fairchild.

Judge Nixon started to lecture the prosecutor. You can tell from the transcript he is angry, and he explained that the Federal Courts do not get involved in prosecutorial decisions. He is clearly thinking what they told him was the subject of the investigation, which was how did the case get from the Federal prosecutor to the State prosecutor?

And then at the end of his testimony, he volunteers: "If any grand jurors have any questions, go ahead and ask me. I want you to ask any questions you have." And one more time the prosecutors did not ask him about the blackmail allegations by Wiley Fairchild. They asked Carroll Ingram about it the next day, but they did not ask Judge Nixon. That is it.

That is what is supposed to be the crime. That is why all of this majestic constitutional machinery has been invoked here, and there are four basic defenses that we have.

The House managers have not proved and they cannot prove any of these four matters.

First, that any misstatement by Judge Nixon involved a material matter. Materiality will come back to all these.

Second, the misstatement was made with any intent to deceive or mislead.

Third, there was any misstatement at all. All of his statements were actually true. You have to actually look at the statements themselves, though you cannot look at the articles of impeachment to figure that out.

And fourth, you cannot base a conviction of anybody, and certainly not an impeachment case, on the testimony of Bud Holmes and Wiley Fairchild. They are witnesses without credibility. In fact, the House managers do not even attempt to defend them.

If you conclude that the House managers have failed to confirm any of these four defenses, you must vote for acquittal. But you also must vote to acquit if you conclude that the House managers simply have not carried their own heavy burden of proof to show their own facts, and I would state that burden simply: You must be sure, you must be sure that they have proved their case. If you do not have certainty on that subject, you must acquit.

And because the credibility of witnesses is important here, if you are not sure which witness to believe, you must vote to acquit because they have not proved their case.

One more key point at this level: Every Senator here who voted to convict Judge Hastings 12 days ago has announced and embraced the principles that a jury verdict, that a prior criminal judgment does not control an impeachment determination. That is the unavoidable meaning of the Hastings conviction.

We demand, as a matter of right, that you accord to Judge Nixon every benefit of that principle. You may not vote to remove Judge Nixon from office because he endured a criminal conviction. You may not even let that criminal conviction influence your deliberation. If you do so, you will be betraying the constitutional principle that was announced by the Hastings conviction.

A first offense materiality: The House managers must prove that each alleged false statement is material. That is an irreducible requirement in a false statement case. It cannot be proved here.

We know from the events in this case that if Judge Nixon had immediately thought of blackmail conversations and told the FBI agent and the prosecutor in the interview, if he told the grand jury, nothing would have happened, nothing would have been different. No charges ever were brought based on those events. There was nothing wrong with those events.

His failure to think of them at the time was literally immaterial.

Indeed, we put it in a question that he raised at the hearing. Judge Nixon is accused of lying about something that had no bearing on anything. And in the Hastings deliberations, at least two Senators, Senator Durenberger and Senator Lieberman, have explained not guilty votes on false statement charges on precisely this ground, materiality. You have to believe that the charges matter, that the statements matter, and when you get into article III, there are going to be some statements there that you cannot believe anybody ever thought matters.

He obviously knew about the case, from what I read in the newspapers and what they told him. That is an impeachable offense? That is a very innocuous statement. They are straining at every level, and you cannot buy it.

Second offense, lack of intent: Judge Nixon testified at trial before the House subcommittee and before the Senate committee, and he had told you here today, that the blackmail conversation did not come to his mind. It did not come to his mind when he was interviewed, and it did not come to his mind when he was before the grand jury.

If he did not think of them, he did not intentionally conceal them. It is a simple point. I think you will find most of our defenses, most of our points, are really pretty simpleminded.

The House managers ask you to disbelieve Judge Nixon on this. They claim his testimony is inconsistent. He pointed out to you in passages of our brief, pages 18 to 25, where we give citations to the text, and we show it is inconsistent.

He had the opportunity on a number of occasions to explain why they did not come to mind. He suggested that they were insignificant. He suggested that the whole blackmail allegation was so peculiar and it is so unfounded that it did not come to mind. And those are the other statements they take out of context. But he has always insisted that he just did not think of them.

And there is a distinction he is making here, and it is a lawyer distinction. It is not necessarily a distinction everybody would make, but it shows the kind of cautious, careful witness he is. He remembers the blackmail conversations now. He does remember them. He has an independent recollection of them. So he is not willing to say he forgot them completely.

Lots of people probably would say that. He will not say that because otherwise why does he remember them now? When he was reminded of the blackmail conversations, they came back to his mind. He remembered then, and that is why he describes it the way he does.

But that is the everyday experience of every human being on this planet. Somebody asks you about something and you answer as best you can, and then some time later you think, "Oh, I probably should have told them about that. I left something out, or it did not occur to me to mention it at the time." It is not a horribly sinister thing to have happened.

The House managers suggest here today, though, that you cannot reconcile his testimony at various points of time. Well, you cannot reconcile it if you do not try to, if you do not even admit the other testimony happened. You can reconcile it by understanding this distinction.

But there is powerful circumstantial evidence here which corroborates Judge Nixon. And I want to make clear we embrace circumstantial evidence in this case. It uniformly refutes the impeachment articles. Three other witnesses knew about the blackmail conversations: Wiley Fairchild, Bud Holmes, and Carroll Ingram. They are all witnesses for the House managers, and have already been through this. All three were interviewed just when Judge Nixon was interviewed. All three went before the grand jury when Judge Nixon went before the grand jury, and none of them mentioned the blackmail conversations.

Let us look at why they say they did not mention them. Wiley Fairchild says, "I did not remember them." And he did not remember them until several months later when he was involved in plea bargaining negotiations. He was told that he had to produce a smoking gun on Judge Nixon. So he lay awake nights—that was his phrase, and it is an awful phrase—he said he lay awake nights trying to think of something to tell the prosecutor on Judge Nixon. And then he remembered the blackmail conversations.

Carroll Ingram, I will agree with the House managers on this. I think Carroll Ingram is a witness of absolute unimpeachable integrity. He did not think of the blackmail conversations. It was not until 6 months after the grand jury when Wiley's lawyer tells Mr. Ingram's lawyer, "You know, they are interested in these conversations that happened." Mr. Ingram says, "Oh, I know about those; I can tell them about that." He did not think of it.

What is going on here? The prosecutor's witnesses committed exactly the same supposedly heinous sin that Judge Nixon has committed. But none of the prosecution witnesses has ever been accused of wrongdoing, of any offense in that sequence of events because they failed to mention the blackmail conversation.

This is a point that makes the House managers squirm, and it should. They seek to apply a double standard here. Judge Nixon must remember everything perfectly. That is the standard of testimonial perfection. But their witnesses are not to be held to the same standard. Again, our point is simpleminded. You cannot adopt this double standard.

In fact, even Judge Nixon's prosecutor, a man named Reid Weingarten, testified before the House subcommittee, and he flunked the standard of testimonial perfection. He was asked about the investigation of Petit Bois Island that was conducted in a preliminary manner before the same grand jury. He was asked if he had any part in interviewing any witnesses about it, if he questioned any witnesses before the grand jury.

He flatly denied he had anything to do with it. He specifically denied that he questioned any witnesses about it before the grand jury. He gave false testimony about this. He did question Bud Holmes about that twice, two separate occasions. It is in the grand jury transcripts in our exhibits.

Where is the House managers' outrage over this false testimony by the prosecutor? They do not think he committed perjury there. I do not think he committed perjury there. He did not think of it. He messed up. His testimony was not perfect.

Let me cover a couple more points of circumstantial evidence that establish, nail down, this intent to question. First, he was a complete volunteer. I mentioned it. You had to listen real hard to get that out of the facts that were described here today by the House managers. He volunteered, asked for permission to go before the grand jury. That is a critical point, and you have to give that great weight in your deliberations when you are trying to figure out what was his intent.

A second piece of circumstantial evidence. What was he lying to cover up? What great crime would have been revealed if the curtain would have been ripped aside and the true facts laid bare? Just these dumb blackmail conversations. When the prosecutors found out about them, there were no charges brought about them. There is nothing wrong with them.

You do not even have to take our word for it, though, because we went to the leading judicial ethics expert in the country. We went to Prof. Geoffrey Hazard, of the Yale Law School. You cannot pick up a legal publication without finding some book by him these days. We gave him the facts testified to by Bud Holmes. We do not think you can accept those facts, but we said, "OK, we will pretend Bud Holmes is a credible witness. Take the facts he described, and you tell us, is that a violation, is that an offense?" And in his letter, exhibit 68-A, he says, it is not even an ethical violation. It is not—without even asking if it is a crime—it is not even an ethical violation to have had those blackmail conversations.

Judge Nixon has said it best. He is accused here of having lied to conceal his innocence. He would not have done such a dumb thing, and he did not.

Another piece of circumstantial evidence: Why would he lie to cover up these blackmail conversations when three other witnesses knew about them—Bud Holmes, Wiley Fairchild, and Carroll Ingram. They all knew about it. He knew they were being subpoenaed. There is no testimony anywhere that he told any of them to hush up the blackmail conversation; let us keep this under wraps; we do not want anyone to know about that. In fact, there is no evidence he had any contact at all with Mr. Ingram or Mr. Fairchild about the testimony concerning this case.

Mr. Holmes makes some fairly far-fetched allegations that he inferred from Judge Nixon's silence that he was supposed to lie about the blackmail conversation, and I am going to talk about Bud Holmes' credibility.

But another piece of circumstantial evidence, the character witness. We called the leader of the Mississippi bar, the head of the State police, a brother Federal judge, the former supervising agent of the FBI. They were unanimous in their testimony that Judge Nixon has an outstanding reputation for truthfulness.

Part of what you have to do here is to take the measure of Walter Nixon, the man. What has he done with his life? What has he made of his life? A very successful private attorney, had a very profitable practice that he left in his late thirties as a relatively young man to serve his country as a Federal judge. He has served on the bench with distinction for more than 20 years. No kind of impropriety or blemish until this event. Although he was appointed by a Democratic President, Lyndon Johnson, in 1968, a Republican administration, the Reagan administration, proposed to elevate him to the Fifth Circuit Court of Appeals in 1982. He declined. He prefers the trial courtroom.

He served on supervisory bodies of the Federal judiciary. He was president of the Fifth Circuit District Judges Association. He has earned the respect of his peers. And every witness before the Senate committee who was asked about him testified without qualification about his ability and integrity and about his veracity.

You must ask why did this lifelong public servant and respected judge suddenly begin intentionally lying to a grand jury to conceal his innocence in July 1984?

A third defense concerns the credibility of the House managers' star witnesses. You cannot believe Bud Holmes and Wiley Fairchild, and you cannot convict based on their testimony.

I take no pleasure in making this argument. I am sure Mr. Holmes and Mr. Fairchild have contributed to their communities in some ways. But in this case they were placed under extraordinary pressures by the Federal prosecutors and by the judicial system itself. And they lied.

They have lied so often and they have lied for so many different reasons that I could not possibly review them here today. Instead, I want to just review quickly only the lies they have admitted to or the lies that they have been formally charged with.

Mr. Fairchild: He testified at trial he lied when he was interviewed by the FBI. Our exhibit 22. He said he lied during this interview.

He testified at his second grand jury appearance. This is after he made his plea deal. He testified that he lied during his first grand jury appearance. This is our exhibit 30. He said he lied here.

He testified at the postconviction hearing last August, in Jackson, and he testified that he had lied at Judge Nixon's trial. This is his trial testimony. He said he lied.

Then he testified—and excuse me, his testimony there was exactly the same as it was before the second grand jury testimony. That is in November of 1984. That is our exhibit 41-A; he said he lied here, too.

Then he testified, and this is extraordinary evidence and it gives you a flavor for Mr. Fairchild as a witness, he testified before the Senate committee that he has always told the truth in this case. That means a lot of things, I think, but we know it must mean he lied at the postconviction hearing when he said he lied at trial.

We also know what it really means, which is that Mr. Fairchild does not have a clue what the truth is. He does not have much regard for what the truth is.

Bud Holmes: Mr. Holmes is really their key witness. He testified before the House subcommittee that he lied to the FBI, in May of 1984. That is our exhibit 29. He was indicted for testimony before the grand jury in July of 1984. That is our exhibit 32.

This is important. He was indicted here for testimony that did not relate to Judge Nixon, because he tries to say now and again, well I was just protecting Judge Nixon. But he admitted in this testimony, these lies he got indicted for were not to protect Judge Nixon.

He went to the grand jury in September of 1984, that is our exhibit 33. He got indicted for lying here, again. And he admitted that that testimony he got indicted for was not given to protect Judge Nixon, it has nothing to do with Judge Nixon.

He went to the grand jury in February of 1985. This is an important trip to the grand jury. I am going to come back to it real soon. He got indicted for lying then and he pled guilty to lying on this trip. And here is where he tried to claim that he was protecting Judge Nixon. That is a tough claim to follow because he says, "I went to see Judge Nixon and he denied that the phone call ever happened. But then I went in the grand jury and I lied and I said that he remembered that the phone call happened but he really did not, so I lied then and I am telling the truth now."

Boy, that is tough to put much faith in.

But, when we cross-examined him about it he admitted that the testimony he really did give here, in this February 1985 grand jury, that that testimony did not actually protect Judge Nixon.

In the House subcommittee we confronted Mr. Holmes with the civil deposition he gave on these matters in 1987. He said his testimony was not accurate there, either.

Then there is his written affidavit, and I have to take a second on this one. Maybe it is just a point of personal privilege here. I interviewed him to prepare this affidavit. It is in the materials. It is an exhibit. And we told him, Mr. Holmes, we just need the truth.

He has testified to this. That is what we said, "Do not tell us anything that is not true. We have enough trouble without more lies."

Based on the interview we prepared an affidavit and we read it to him over the phone, with his lawyer on the phone, and we said, "Is this true, Mr. Holmes? Do not sign it if it is not true."

He said, "It is true."

His lawyer said, "Oh, it is true."

We sent it to him, we sent it to his lawyer. He signed it. He tells us he read it before he signed it.

And then he told the House subcommittee it was false. He said it was a lie.

But Mr. Holmes gets extra credit. He did not just lie himself. That is how extraordinary a witness he is. He tried to get other people to lie, and they have never mentioned that. They have never told you even one word about that.

In February of 1985, Bud Holmes got subpoenaed to the grand jury again. He knew the prosecutors were going to question him about the blackmail conversations. So he went to Carroll Ingram, and he asked Mr. Ingram to change his testimony. There is no pretty way to describe this. He suborned perjury. And Mr. Ingram showed him the door.

Then he went to Katie Matison. Katie Matison had worked for him, she had been the assistant district attorney, and she had some responsibility for Drew Fairchild's case. And he said, "Katie, you know, you did everything in that case. You were the person that made the decisions. I did not have anything to do with it." He tried to get her to lie for him. He suborned perjury again. She showed him the door.

Then he went to see Walter Nixon, and he reminded him of the blackmail conversations and he said, "Those really did not happen, did they?" And Judge Nixon said, "You know they happened and there was nothing wrong with them, and if I am asked about them I am going to tell them about them." And then Bud Holmes went to the grand jury and he told them that was what he said, except now he says he was lying when he said that.

This credibility problem, this credibility issue, is a big problem for the impeachment articles because Bud Holmes' credibility is essential for their case. He is the only witness who claims that Judge Nixon said Wiley Fairchild had asked him to put in a good word for Drew. I wish I had a nickel for every time I heard that phrase. It comes from no one but Bud Holmes.

Wiley Fairchild says, I never asked him to do that. Judge Nixon says "he never asked me to do that and I never said it to Bud Holmes."

The circumstantial evidence flatly contradicts him about the entire conversation. Carroll Ingram says he was not even at Bud Holmes' office at the time Bud Holmes claims he was. Only Bud Holmes claims that, and you have to believe Holmes to buy their case.

A second point. Bud Holmes is the only witness who claims he told Wiley Fairchild and Judge Nixon that he would pass Drew's case to the files. They have hung a lot on that. Bud Holmes promised to pass the case to the files. He is the only guy who says he said it. Wiley Fairchild never heard it. He is the guy on the other end of the phone. He says, no, Bud Holmes never told me that.

Judge Nixon never heard him say that. The circumstantial evidence flatly contradicts Mr. Holmes. Only Bud Holmes claims that. They need you to believe Bud Holmes. And he is the only witness who says that he passed the case to the files because of those blackmail conversations.

The circumstantial evidence that I outlined here clearly shows that he did it because Bill Porter came to him. Judge Nixon refutes that there was any conversation about passing the case to the files. Wiley Fairchild does, too. He says there was no such conversation. They need you to believe Bud Holmes on that.

And he says the blackmail conversations happened in May of 1982. No other witness says that, not Carroll Ingram, not Wiley Fairchild, not Rodney Fairchild—who is Wiley's brother—not Judge Nixon.

I want to take a second on the date of the phone call. Mr. Majority Leader, I may blow it on time, so I am going as fast as I can.

Mr. MITCHELL. Take your time.

Mr. STEWART. This was the key issue at Judge Nixon's trial. The prosecutor states his case that the phone call happened before Mr. Drew's case went to the files. It is really not the key to the whole case, but through the alchemy of the trial process, it became the key then.

There is some awfully strange testimony about that. Wiley Fairchild—this was amazing stuff—in the Senate committee, he marched into that Senate committee 7 years after the event. He had testified on five occasions, twice before the grand jury, twice in court, and once before the House subcommittee, on exactly this subject. And for the first time in his life Mr. Fairchild testified that those conversations happened on December 1, 1982.

It came to him out of the ether. All of a sudden, he has had this epiphany: it happened on December 1, 1982. They do not even mention it in their briefs; it is so embarrassing to them. They do not even mention it here; it is so embarrassing to them. It raises some big questions.

What kind of witness is Wiley Fairchild that he has to keep making up new stories? Does he not have any idea what the truth is? What kind of case do they have, relying on this man? But there is another question here. How can you convict when their two witnesses, their two star witnesses, Bud Holmes and Wiley Fairchild, have directly opposite testimony on this?

Bud Holmes has said over and over it happened in May of 1982. Wiley Fairchild said it was in December. That is a big difference. It does not fit.

But the key point here is that neither date makes any sense. This is testimony that they have all cooked up at different times.

Let us go back to the circumstantial evidence. When you have conflicting testimony, when you have witnesses you cannot make any sense out of, you have to go back to the circumstantial testimony, something you can get our hands on. Mr. Fairchild, for all his confusion every time he testified, has said that he wanted to talk to Judge Nixon because he was upset about the publicity about Drew's case. Judge Nixon has testified that when he had the conversation with Wiley Fairchild, he remembered he had read something about Drew's case in the newspaper. Rodney Fairchild, also associates the blackmail conversation which Wiley told him about at the time, he remembered them happening about the time of publicity.

So we went to look for publicity, and we presented the evidence we found. The House managers never went to look for it, and they never presented any evidence on it. It is undisputed there was no publicity for months before May 1982 when Bud Holmes said those conversations happened. None. It is undisputed that there was no publicity for months before December 1982. In all of 1982, there was no publicity about Drew Fairchild's case.

The publicity came in January 1983, after the case was passed to the files. The publicity was about the case being passed to the files. That was the only newsworthy thing that ever happened.

Think about it. He pleads guilty in January 1982 and nothing happened for a year. How could there have been any publicity? There was nothing to write about. It is consistent with Judge Nixon's recollection that it happened in March 1983, this circumstantial evidence. It is consistent with Carroll Ingram's recollection it happened within 3 or 4 months of late 1982. In fact, it is consistent with Wiley Fairchild's testimony last August.

With Mr. Fairchild, you have to identify which time you are relying on, which piece of testimony. In last August, his testimony now says he cannot remember. The transcript shows he said the conversations happened after the case was passed to the files and then he lied about it at trial in order to curry favor with the prosecutors.

But there is another piece of circumstantial evidence here, another piece you can grab on to with both hands. Both Judge Nixon and Wiley Fairchild remember and have always testified that Mr. Fairchild told him Bud Holmes is blackmailing me. I think maybe Carroll Ingram is in on it, too. OK, there is a fact; there is something we can grab on to.

How do we get Carroll Ingram into the picture? Mr. Fairchild has said always Carroll had nothing to do with the case until he brought the order to him on Christmas 1982 passing the case to the files. That is when Carroll is involved. That is when he started to suspect that Carroll was involved in this case and involved in the blackmail.

Here is a firm anchor, another one. Since the date when he received the order passing the files is when he began to suspect Carroll Ingram, he could not have had the conversations before that date. That is precisely as Judge Nixon has testified.

While I am on credibility, I do want to spend a minute on Mr. Ingram. He is a witness of solid credibility, but I want to stress one more time, if you believe his testimony and the House managers try to grab shreds of his testimony and say that he really supports them. Look at his videotape, if you are even tempted for an instant to believe that. I wish I could show it here today because he supported us.

If you believe Carroll Ingram, you acquit Judge Nixon because Carroll Ingram said, I knew about those blackmail conversations and I did not think of it. And Carroll Ingram says, I did not really have a discussion. This was not a discussion; it just came up. If you believe Carroll Ingram, you have to acquit.

I have been pretty harsh about Mr. Fairchild and about Mr. Holmes. So I owe you an explanation of what their motive is for all of this lying. I cannot claim I can explain it all. But look at the pressure they were under. Mr. Fairchild was told he had to come up with a smoking gun to get a plea bargain. We have documented through the testimony of John Baltar, his assistant, and his lawyer, Karl Kepper, that Wiley changed his story. He changed his story on three facts to satisfy the prosecutors and get his plea bargain: On the date of the blackmail conversation, on the date of the investment, and who placed the telephone call from Bud Holmes' farm.

When I say them out loud in this august body they sound so trivial, but at trial—read the closing statements. We took the strange step, we made the prosecutor's closing statement an exhibit in our behalf because he hung the whole case on those three dumb facts. He was a very, very good prosecutor, but you have to understand that he got Mr. Fairchild to change his testimony on those facts.

Mr. Fairchild had trouble remembering those facts so they prepared scripts for him, Exhibits 37 and 38 and 39. The originals had yellow highlighting for the really important facts he had to remember, the ones he was changing. There are arrows all through it. We even have a couple in the prosecutor's own handwriting. They are skeletal. They are to give Mr. Baltar the idea of how he is supposed to coach Wiley Fairchild to give his new testimony.

Mr. Fairchild got value for his new testimony. He got a plea with a sentencing recommendation of no jail time, a free walk. That is pretty good. He got a promise that the prosecutors would help him get an executive pardon. He got a promise that he would help with Drew's case, and you know, they did, they made good on this promise because a couple years later, actually it was only 6 months later, excuse me, Judge McKenzie—and I am jumping around but stay with me—Judge McKenzie, a State court judge, says, I am not going to respect that plea bargain. This guy is a drug smuggler. What does the prosecutor do? He races into court, races into his grand jury, and indicts Fairchild to preempt the prosecution.

He is moving heaven and Earth to make some kind of case against Judge Nixon, and he is trying to save the drug smuggler from going to prison for too long, and he did it. Judge McKenzie was going to give him 5 years. A Federal prosecutor made sure Drew Fairchild only got 6 months. He is the guy who helped the drug smuggler, not Walter Nixon.

They also promised to help him retain his eligibility for contracting with the Department of Housing and Urban Development. I could not have made that up for this timing right now. That is what it was. He wanted to be eligible for HUD contracts, and they promised to help him with it. He traded his testimony for a very good deal.

But Holmes, he was told right before he was going to be indicted in March 1985, that if he could fill in a few gaps in the investigation, then he would not even have to be indicted. The prosecutor said to Mr. Holmes, you are a savvy guy, you know what I mean.

And he knew what he meant. We all know what he meant. Give me Walter Nixon.

I will say this for Mr. Holmes, he did try to hold out. He would not make a deal there. He got indicted, but during jury selection, his nerve failed him. He cut a deal. It was another sweet deal. He pled guilty to a nonfelony, contempt of court. He was standing trial on five felony counts. He got a nonfelony, contempt of court, and he did not spend a day in prison.

You ought to know that Federal prosecutors tried exactly these same tactics with two other men in the Petit Bois Island case, that parallel grand jury investigation. John Stocks and Eugene Lewis were two men from Florida. The prosecutor said you do not have to be indicted either; give me Walter Nixon. They said we do not have anything on Walter Nixon, so they got indicted and they went to trial. They did not cook up any stories, and they got acquitted.

You know that Bud Holmes and Wiley Fairchild have lied. They told you that. You know that Bud Holmes has asked others to lie for him. You know that both men bought sweet plea bargains with their testimony, and you also know they now face a perjury prosecution of their own if they try to go back on what they told the prosecutors after they made the plea deal. They are now hostages to their own lies. Mr. Fairchild is just such a strange witness that he goes back and forth anyway, but Holmes knows that, so he has to stick to his new lies. And you cannot convict on their testimony.

Our final defense—and I am not sure I am going to make the deadline, literal truthfulness—it makes no difference what was in Judge Nixon's mind. I am being a lawyer here, 100-percent lawyer. If he wanted to lie up, down, and sideways, you cannot convict him if what he said was true.

If he spoke true statements by mistake, you cannot convict him. And when you look at the actual statements, when you look at what he really said in the transcript, do not look at the way they molded it and they chopped it up and they paraphrased. Do not look at that. Look at his testimony. You will discover that they are entirely true.

Article I, Judge Nixon told the grand jury that he did not recall Bud Holmes discussing the *Drew Fairchild* case with him. There are at least four aspects of this testimony that establish its truthfulness.

First, it is clear from Fairchild's testimony and Judge Nixon's testimony, both of these concerning blackmail. They did not concern Drew's case. Mr. Fairchild said he was not seeking favors for Drew; he was trying to get Bud Holmes off his back. If Bud Holmes had wanted to prosecute Drew, that was fine. He should prosecute Bob Royals, too, and he should stay off Wiley's back.

Judge Nixon thought exactly as he should have, this is blackmail conversation, and his statement that Mr. Holmes did not discuss Drew's case with him was absolutely true.

There is a second point here, though, and this is critical. This is one of the things they never tell you about. Judge Nixon mentioned it, though. We do have one piece of evidence, one piece of testimony that is now uncontradicted, and in this case, it is tough to find uncontradicted testimony. So again grab on to it with both hands. Bud Holmes and Judge Nixon agree that when Mr. Holmes said, "Let me tell you about Drew's case," Judge Nixon said, "No, I don't want to hear about it." He stopped him. He prevented him from telling him about it.

This is important. If he had stopped him from telling him about the case, it has got to be true when he says Mr. Holmes did not discuss the case with him.

Put it in your own terms. Someone walks up to you when you are talking on the street. Senator, I want to talk about bill No. 642. You say I do not have time now. I do not want to talk about it.

When you are asked about it 2 years later, did you discuss bill No. 642 with Mr. X, assuming that you would remember this conversation, which, of course, I really do not think you would, of course you can say, no, there was no discussion.

This is not a sophisticated argument. It is not a clever argument. It is just common sense.

You also have to look, though, at the way the question was asked because there are two clear ambiguities there. First is the term "discuss." There were two witnesses who were asked this question in some sharp questioning by the Senate committee members. Carroll Ingram was asked about it and one of our character witnesses, Will Denton, who was a lawyer. They both answered like a lawyer would answer and like a judge would answer. They said discuss means more than just a passing mention and, in fact, they even suggested that discuss might mean suggesting about influencing the case. It has another meaning, another layer of meaning. This sort of glancing exchange that occurred between Judge Nixon and Bud Holmes was not a discussion.

There is the further ambiguity of the *Drew Fairchild* case. The investigators had told him they were investigating how the case went from Federal hands to State hands. That is what he thought they were asking about Drew Fairchild's case. He had no knowledge of that. He had no involvement. There was no evidence that anyone ever discussed that with him, even raised the issue. And when he answers no, he does not recall any such discussion, that is what he is answering.

Article I, you cannot convict on.

Article II, here the impeachment article parts company with Judge Nixon's actual testimony. You have to be very careful. You know exactly what his testimony was. Even after they amended it a few weeks ago, article II still distorts that testimony and takes it totally out of context. It compresses 24 lines of transcript into 6 lines of paraphrase and little bits of quotes. That is another red warning signal. They are playing with the facts.

Let me deal with the testimony charge in article II in three parts.

First, the allegation that Judge Nixon supposedly falsely stated that he had nothing to do with Drew's case in Federal court or State court. Of course, that was true. To the extent he could think about those conversations, he thought of them as blackmail conversations, not about Drew's case. That is what Wiley testified and that is what Judge Nixon testified to. But, moreover, Judge Nixon had no role in Drew's case. He played no role in it, had no involvement in it. All the witnesses agree that he was not asked to play any kind of role in it.

Mr. Fairchild says he made a blackmail complaint and he sought no advantages for Drew. Bud Holmes agrees that Judge Nixon did not ask for anything, he did not ask him to do anything, and when Mr. Holmes claims that he volunteered to pass the case to the files, Judge Nixon said I am not asking you to do anything.

But look at his grand jury testimony, too. The testimony is that he had nothing to do with the case in State court or Federal court. They want you to read right over that when they tell you about that here today. You lose all those words. They are really trying this case against 6 words and then they leave out 5 words and then want to try it against the next 6 and leave out the next 12. You cannot let them do that.

He had no involvement in the case in Federal court or in State court under any construction of the evidence. His statement was true.

Then article II moves from mere distortion to gross distortion. It accuses Judge Nixon of falsely testifying that he never handled any part of Drew's case never had a thing to do with it at all. They have not told you his full statement again.

His testimony was—and I am going to maybe bore you with it—and I am quoting: "I never handled any aspect of this case in Federal court. As you said"—this is the part they left out—"As you said, Judge Cox handled it. I don't know. Somebody told me maybe Judge Russell handled one of the other defendants also, but I never handled any part of it, never had a thing to do with it at all."

He was saying I was not the judge in the case. You would not know that from the impeachment article. You would not even have a hint of it. They took out all those words in the middle. You have got to look at the whole testimony. It is true he was not the judge in the case. He never had a thing to do with it at all as the judge in the case. His statement was true.

Finally, we come to the part of article II that even the House managers have admitted was wrong. This is the part they had to amend. Before the allegation was that he did not attempt to influence anybody. Now the allegation is that he said he had not influenced anybody.

It was absolutely true because the blackmail conversations occurred in March 1983, and I have gone through all of that. After Drew's case was passed to the files, they cannot point to a single event that indicates that he influenced the case. Mr. Holmes and his tired old testimony says it was somewhere in the back of my mind 7 months later when Bill Porter came to me and said please help Drew's case, one of the reasons I did it was because I talked to Judge Nixon 7 months ago and told about Wiley Fairchild.

Nobody says it happened months ago. It does not make any sense he waited 7 months before he did it. It is absolutely incredible.

But let me take Mr. Holmes' testimony, all of his testimony, on this point, because when you look at it hard, it supports us. He claims that he told Judge Nixon that he could pass the case to the files and the judge said, I do not want you to do anything. And he says that after that one of them said—he does not remember—one of them said, let us call Wiley and tell him about Drew's plea bargain, the preexisting

Stop and think about it. Mr. Holmes says they——

The **President** pro tempore. The time of the respondents has expired.

Mr. **Mitchell**. Mr. President, I ask unanimous consent that counsel be permitted to continue for such time as he needs to complete his argument, and that an equal amount of time be added to the closing argument of the House managers, if they choose to use it.

The **President** pro tempore. Without objection, it is so ordered. Mr. Stewart will proceed for such time as is required for him to complete his argument.

Mr. **Stewart**. I appreciate the Chamber's courtesy, and I apologize for my long windedness. I have worked on this case a long time, and I have a lot on my mind about it.

All right, we are at the point where they are making the phone call and they are making a phone call for only the reason of telling Wiley about the preexisting plea agreement and they tell him, according to Bud Holmes, about that. And then Judge Nixon hands him the phone and walks away, and this is where Mr. Holmes says I volunteered, told Wiley I could pass it to the files. Wiley did not hear him say that. Judge Nixon did not hear him say that.

So what we know is that when Judge Nixon walks away from that telephone, all he knows, even according to Bud Holmes, is that he was told there is a preexisting plea agreement, that it was told to Wiley Fairchild that it was going to be respected.

He did not influence the case even one instant. There was a suggestion made here, which I do not understand, earlier today, that somehow Judge Nixon's testimony here also is false because he somehow influenced Wiley Fairchild. I am not sure I heard that right because I do not understand it. If that is explained to you in the rebuttal, maybe I will understand it better. It does not make any sense. Wiley Fairchild was a bystander. He was not a defendant, and he was not a public official. I do not understand what they are talking about.

Article III—we have been forthright in our condemnation of article III. It is a prosecutor's trick bag. It is designed to make it easy to convict. You heard them tell you today we have given you 14 charges; you only need to find 2, just 2—pick from our list, 1 from column A and B. You do not need a two-thirds majority on any of those. Just pick two. They want you to gut the Constitution.

They have also introduced it with a lot of rhetoric, empty rhetoric, I think, about doing embarrassing things, bringing on the Federal judiciary. That is not what the Constitution says. It says high crimes and misdemeanors. If they cannot prove them, they should not allege all this other stuff.

The House managers defend article III. They call it an omnibus impeachment article, and they say there have been omnibus impeachment articles before. They are right. There have been. We also used to cut off people's ears for punishment, and used to brand them with hot irons. We outgrew those barbaric customs. I hope someday soon, real soon, we will outgrow omnibus impeachment articles.

The first instance of an omnibus impeachment article that I can find was article XI in the impeachment articles against President Andrew Johnson in 1868. That impeachment effort still stands as one of the most shameful chapters in Congress' history, in our Nation's history.

A Member of this Senate, John Kennedy, wrote about the Johnson impeachment in his book "Profiles in Courage." President Kennedy described the omnibus clause against President Johnson. He described it, and I am quoting: "as the deliberately obscure conglomeration of all the charges in the preceding articles." That is pretty good. I cannot do as well. President Kennedy pointed out that the House managers in the Johnson case called for the first vote in that case to be on that deliberately obscure impeachment article because it was thought to be the easiest way to get a conviction.

Omnibus impeachment articles are no less hateful now than they were in 1868 when President Johnson stood before this body, or when they were in 1954 when President Kennedy wrote his book. We must insist that the House managers prove each and every one of those 14 alleged false statements. There are no shortcuts in the impeachment. You must insist that you will not vote for impeachment if you are in doubt as to even one of those.

The framers of the Constitution intended impeachment to be a solemn and grave proceeding with the Senate carefully weighing evidence on specific and carefully drawn charges. They did not intend for Federal judges to be removed from office based on a deliberately obscure conglomeration of charges. The framers would cry out in anger to see the abuse of the impeachment procees that is involved.

I take some heart, perhaps foolishly, in the Senate's recent rejection of the omnibus impeachment article against Judge Hastings. That was article XVII in his case. You have an opportunity in this case to send a second and unmistakable message that you will no longer permit the trivialization of the impeachment process by such gamesmanship.

I am over on my time. I want to make a few specific points about article III, the specific allegation.

They charge seven supposed false statements in the interview. We insist that there was no proof of Judge Nixon's intent to deceive anywhere, but for the interview the proof of intent is even less. He was caught cold. They walked in, he had no warning. He had no time to prevaricate. He had nothing. He just answered cold. There is no basis for an inference of intent here. Those charges cannot be supported on that circumstantial evidence.

Six of the fourteen statements simply repeat the charges from articles I and II. In each of the other allegations, though we insist that Judge Nixon's testimony was true, there was talk here about how somehow we concede it was not true. I do not understand that. Read our brief, pages 92–101. We take on every one of those allegations. They were all true statements.

But I want to highlight two of them to give a flavor of what we find so wrong in this impeachment article and these impeachment articles. Article XXXI(a), the claim is Judge Nixon falsely denied during the interview that Wiley Fairchild had discussed Drew's case with him. Wiley Fairchild testified that he did not discuss Drew's case with Judge Nixon. Judge Nixon testified that they did not discuss the case. That is the entire evidence in the matter. Two witnesses, two parties to the conversation, they did not discuss the blackmail conversation, talked about blackmail allegations. There is no evidence to support the allegation.The allegation was made at Judge Hastings' trial with respect to his grand jury testimony, identical to grand jury testimony. He was acquitted on that.

The House managers, evidently, did not have the courage to take on that jury acquittal. So what they did is they did not charge the grand jury testimony was false; they charged that his interview testimony was false. That is very clever. That is very subtle. The Constitution and the impeachment process in this body should not be about such subtle and clever games. His testimony was true, the jury found it was true, he must acquit on that charge.

Article XXXII(c), this was grand jury testimony. The alleged false statement is that Judge Nixon gave the grand jury all the information that he had and that he could and had withheld nothing during this grand jury testimony. That is not what he said. He said "I came here voluntarily and I am very happy to cooperate with this grand jury and give them all the information that I have and that I could. I had nothing to withhold, and I brought everything that you asked me to bring." He said he was happy to cooperate.

That is not what they charged him with. They made up something for him to say that they could charge him with. He said he had nothing to withhold. That is not what they charged him with saying; they made up something for him to charge him with saying. That he did not withhold. He did not withhold anything. I do not have any problem defending even the statement they charge but it gives you a terrific insight into this process. They are charging him with having lied about statements he did not make. They are asking you to send him to dishonor in history for lying in statements he did not make.

In closing, I want to admit that I am not so subtle or clever at these impeachment articles. I recognize that perhaps I have been speaking more bluntly than is wise, and I am sure I have spoken longer than is wise. I can think of no subtle way to make these points.

The impeachment articles in this case presume that you are going to be lazy. The impeachment articles presume that you are not going to know the facts well enough to catch the facts that have been omitted. The impeachment articles presume that you will not actually look at the transcripts of Judge Nixon's testimony, that you will not catch where the attorneys twist his words or leave key phrases out or take them out of context, fundamentally transforming the testimony.

The impeachment articles presume that you will not know enough about the facts of the case to realize that nobody could be convicted on the testimony of Bud Holmes and Wiley Fairchild. They presume that you will not know enough about Judge Nixon's testimony to realize he also testified consistently about state of mind in an interview in July grand jury testimony.

We rely on the opposite. We are relying on your love of country and the Constitution, and your duty, and that it will be so strong that you will be willing to burrow into this horrible stack of materials, and that you will not be blinded by a conviction that should never have happened, and that you will do impartial justice as you have sworn to do.

If you read nothing else, we beg you to review carefully two passages in our brief. Pages 17 through 57 of our brief; it is 40 pages where we talk about the intent issue and talk about the facts that they omit.

The second passage is pages 74 through 100. That is where we take each article and show the literal truthfulness of what he said.

We are confident that when you know the facts, you will resolve to vote not guilty, and you will resolve to return this excellent judge to the service of his country.

Thank you.

The PRESIDENT pro tempore. Thank you, Mr. Stewart.

The Chair is in receipt of the following questions by Senators. First, a question to Mr. Stewart or to Judge Nixon.

Mr. MITCHELL. Mr. President, I do not know whether the House managers wish to have their rebuttal now, prior to questions, or whether the Chair wishes to have the questions prior to the rebuttal.

The PRESIDENT pro tempore. The Chair thinks it best in this instance to profound the questions first.

First, to Judge Nixon or his counsel, and then to the House managers. They may answer during their rebuttal, or they may answer specifically prior thereto.

The following question has been submitted by Mr. KOHL of Wisconsin, to Mr. Nixon's counsel. I am reading the question now.

> This question concerns Judge Nixon's motion to dismiss article III. That article accuses Judge Nixon of making one or more of 14 false statements.
>
> The House says that a Senator should vote to convict if he or she believes that Judge Nixon is guilty of some but not all of the 14 specific actions described in article III, but does that not mean that Judge Nixon and the American people will never know which particular acts in article III we believe he committed?

Mr. STEWART. I find that a very pungent question. I think that is precisely one of the real flaws of article III, because if each Senator has the right to say, "Well, I am going to vote for impeachment based on articles III (1)(a) and III(2)(g)," and the guy next to you says "I am going to vote to impeach on articles III(1)(c) and III(2)(a)," we do not know what happened. We do not know and your constituents do not know and history does not know what was found to be false. And we do not have a two-thirds majority.

I cannot think of much more to say. I think that is exactly one of the fatal problems with impeachment article III.

The PRESIDENT pro tempore. The second question is by Mr. Bingaman. Excuse me. This question is addressed to the House managers.

This question is addressed to both parties, so the Chair will inquire of Judge Nixon's party. The question is submitted by Senators Harry Reid and Steve Symms.

> Question No. 1: Since Federal Prosecutor Weingarten and Agent White-Spunner clearly knew about the Wiley Fairchild blackmail allegations at the time of the Nixon interview but did not ask Judge Nixon about these allegations, would you conclude that the interview was set up to trap Judge Nixon?

Mr. Stewart.

Mr. STEWART. I do not know; it is possible. Things like that happen. It has been done. I think there is a pattern when you are dealing with a target in a grand jury investigation to try to get them spread on the record. Every lawyer knows how to do that.

I tell you candidly I did that with Reid Weingarten before the subcommittee. I pointed out where he testified falsely. You get him spread on the record and then you poke at him.

They knew about the blackmail allegations, and they never asked about them.

I cannot explain it. I think they need to explain it. I think you need to insist on an explanation, because I do not think there was an explanation.

If I could have 1 second.

The PRESIDENT pro tempore. This question is to Mr. Stewart.

Judge NIXON. May I add something to that, please?

The PRESIDENT pro tempore. Yes, you may proceed.

Judge NIXON. I cannot say definitively, but either it was designed to trap me or they felt it was so immaterial and of no consequence they did not ask me, immaterial to the investigation.

The PRESIDENT pro tempore. The following question is asked of Mr. Stewart by Senator Cohen.

> Is it the defense's position that there can be no impeachable offense that is not based upon a criminal act or offense?
>
> In other words, does the phrase "high crimes and misdemeanors" mean that a judge cannot be removed from office for anything but a criminal act?

Mr. STEWART. There is a lot of scholarship on this issue. We think the scholarship that makes sense is it either has to be an illegal act or else it has to be an abuse of office.

When you look at the debates before the Constitutional Convention, there were other formulations of the impeachment clause that were proposed, removable by address, which was the old English system. You did not have to have a reason for removing a judge if you had a majority vote, removal of formal administration. And the Framers said, "No, that is too easy."

They used the phrase "high crimes and misdemeanors," and I am not competent to deal with the scholarships, what precisely that meant in 18th century England, but the people who make sense about this say it is either a very serious offense, which we believe to be a criminal offense, or it has to involve some misuse of office, and of course that is not charged here. There is no misuse of office.

But we do agree that if there was misuse of office, that it was not criminal. And I guess my best analogy—it may not be a great one—would be President Nixon. That was a charge of misuse of office, and some of those articles may not have been criminal. Those would be impeachable offenses.

The PRESIDENT pro tempore. The Chair submits the following question to Mr. Stewart, and it will be asked of the House manager. The question is from Senators Reid and Symms:

> Is there evidence that informer Skip Jarvis' characterization of Judge Nixon in his letter to Agent White-Spunner of the FBI was an attitude held by the prosecution in Judge Nixon's trial?

Mr. STEWART. You bet. What is referred to there is Skip Jarvis is the guy who made the first anonymous allegation against Judge Nixon.

He wrote a letter to the FBI after Bud Holmes was convicted after plea bargaining, and said, "Three down or four down"—I do not remember the number—"one to go. I am very eager to go after the big prize," and that is what happened here. They were going after the big prize from day 1.

We have all seen it. It is not a pretty thing. It is a disturbing thing when it happens, especially when you get a case like this where you peel away everything that happened and cannot fit anything illegal under there.

But, yes, that was the attitude of the case. That is where they leaned on Bud Holmes and Wiley Fairchild and John Stocks and Eugene Lewis. They were leaning on anybody they could to get that big prize.

The PRESIDENT pro tempore. The third question is by Senators Reid and Symms. The first is to Mr. Stewart:

> We received some evidence that Reid Weingarten, the Federal prosecutor, was involved in preparing a script for Wiley Fairchild's testimony at Judge Nixon's trial.
>
> Are you satisfied that Wiley Fairchild, despite the script, was telling the truth about Judge Nixon?

Mr. STEWART. It is hard to be satisfied about anything, of Mr. Fairchild telling the truth. Now, at trial I think he did lie, and it is clear from the evidence.

The script, John Baltar's testimony is very important about this. We did not present Mr. Baltar as a live witness because we were trying to respect the Senator's concern that we keep moving.

He is a very specific witness on one point. But his testimony about this is pretty disturbing. He describes this process by which two scripts were prepared: one for the grand jury testimony, and one for the trial.

And he said I did not know if it was true or not, but I sure knew Wiley Fairchild was changing his story. And that is why we needed the scripts because he could not remember the new story. I think that is really important here. It also gives you some insight into the prosecutor's mindset—what were they willing to do to create these scripts? I held them up before. I have never seen scripts like that in a criminal case before with a key witness. It is pretty extraordinary.

The PRESIDENT pro tempore. The following questions are submitted to the House managers. These are questions by Senators Reid and Symms. Question No. 1:

> Since Federal Prosecutor Weingarten and Agent White-Spunner clearly knew about the Wiley Fairchild blackmail allegations at the time of Nixon interview but did not ask Judge Nixon about these allegations, would you conclude that the interview was set up to trap Judge Nixon?

Mr. Manager EDWARDS. Mr. President, in answer to that question, the prosecutors had no reason to ask Judge Nixon about blackmail. Wiley Fairchild had complained about blackmail, but he did not say that he had talked to Nixon about it. At the time of the interview, there was no reason at all to ask Judge Nixon about blackmail because the prosecutors, the interviewers, would not know anything about blackmail at that time.

The **President** pro tempore. A question, again to the House managers, by Senators Reid and Symms.

> Is there evidence that informer Skip Jarvis' characterization of Judge Nixon in his letter to agent White-Spunner as "the big prize" was an attitude held by the prosecution in Judge Nixon's trial?

Mr. Manager **Edwards**. Mr. President, this question is about the alleged prosecutorial misbehavior that Mr. Stewart, a very able lawyer, mentioned in some detail. We were greatly concerned about prosecutorial misconduct, and we investigated it and are comfortable that there was none.

I might also add, Mr. President, that the courts looked at it in great depth. There is no evidence, Mr. President, that Skip Jarvis, in his statement that they were going to go after the big prize, was shared by the Federal Government. Not at all. It was Skip Jarvis', that was his allegation. You do not find the Government, the United States, saying anything like that and no evidence to that effect.

Now, about the script. We urge you to look at the evidence. There are no false statements in the scripts. They are truthful, prepared at Wiley Fairchild's request. The courts looked at this conduct and said there was no problem. There was an extensive hearing, almost a full trial, with Judge Nangle, as a result of Judge Nixon's position in *habeas corpus*. And prosecutorial misconduct was very much a part of the petition in *habeas corpus*. In a lengthy opinion, 59 pages, Judge Nangle, found no prosecutorial misconduct whatsoever, and it was looked into in great detail, and that was confirmed by the court of appeals.

Mr. **Stewart**. Is it possible that I could make a comment on that?

The **President** pro tempore. Senators Reid and Symms have the following question for the House managers:

> We received some evidence that Reid Weingarten, the Federal prosecutor, was involved in preparing a script for Wiley Fairchild's testimony at Judge Nixon's trial. Are you satisfied that Wiley Fairchild, despite the script, was telling the truth about Judge Nixon?

Mr. Manager **Edwards**. Mr. President, I believe I addressed that in my last response. Yes, there was a script requested by Wiley Fairchild, an entirely appropriate request under the rules.

The **President** pro tempore. The following question by Mr. Kohl, of Wisconsin, for the House managers.

> This question concerns Judge Nixon's motion to dismiss article III. That article accuses Nixon of making "one or more" of 14 false statements. The House says that Senators should vote to convict if he or she believes that Judge Nixon is guilty of some but not all of the 14 specific actions described in article III. But doesn't that mean that Judge Nixon and the American people will never know which particular acts in article III we believe he committed?

Mr. Manager **Edwards**. Mr. President, the response of the managers is that each Senator must decide if there is a pattern of falsity which rises to the level of an impeachable offense. A Senator can state his reasons for his vote.

The **President** pro tempore. The following question by Mr. Bingaman addressed to both the House managers:

Question No. 1:

How do the House managers explain why Fairchild, Holmes, and Ingram didn't remember the "blackmail conversations" when they testified before the grand jury?

Mr. Manager **Edwards**. Mr. President, at that time they were trying to protect Judge Nixon, and that was done quite often by them at the beginning.

I might add, Mr. President, if I may, that Mr. Stewart is suggesting that the House of Representatives solely based its case on two witnesses who were not credible: Bud Holmes and Wiley Fairchild.

Mr. Sensenbrenner made the point, and I would make it again, that you have to look at the testimony of Carroll Ingram, who Mr. Stewart certifies is a reliable witness. Mr. Ingram confirms the testimony of both Wiley Fairchild and Bud Holmes. And I refer you to the record, in instance after instance the judge confirmed it himself. We are perfectly comfortable with the articles of impeachment.

Mr. President, I refer you to pages 49 and 55 of our brief that responds to this allegation.

The **President** pro tempore. The second question by Senator Bingaman to the House managers:

In the view of the House managers, when did the blackmail conversations occur, before the case was passed to the files or after?

Mr. Manager **Edwards**. Mr. President, the blackmail matter occurred before the case was passed to the file. And all three witnesses so testified. And I refer you to the record, Mr. President.

The **President** pro tempore. The Chair submits the following question to the House managers. The question is propounded by Senator Rudman.

Does the House dispute the post-trial discovery of the inducements offered to Wiley Fairchild prior to his trial testimony?

Mr. Manager **Edwards**. Mr. President, the trial court in the *habeas corpus* proceeding rejected all allegations of inducement. And I refer you, Mr. President, to page 101 of our brief.

The **President** pro tempore. Was the answer no or yes, to this question by Mr. Rudman?

Mr. Manager **Edwards**. The answer, Mr. President, is no, there were no inducements.

The **President** pro tempore. Then this question by Mr. Rudman:

Why should the Senate, then, give his testimony substantial weight?

Mr. Manager **Edwards**. Mr. President, the testimony of the three principal witnesses, Wiley Fairchild, Bud Holmes, and Carroll Ingram, is basically consistent all the way through.

The testimony of Wiley Fairchild referred to in the question presented by the Senator is confirmed by Carroll Ingram and all of the testimony of all of these key witnesses is generally consistent, all the way through, and is ratified and confirmed by Carroll Ingram, who Mr. Stewart certifies is a reliable witness.

The **President** pro tempore. Senator **Levin** has the following question addressed to the House managers:

Do you agree with Judge Nixon's counsel that his criminal conviction is irrelevant to these impeachment proceedings?

Mr. Manager **Edwards**. Mr. President, I said in my opening remarks that at the beginning of the impeachment inquiry by the subcommittee I chair in the House of Representatives we agreed that the facts surrounding the conviction would be examined, but the fact of the conviction is not persuasive. Certainly there have been many convictions based on false evidence on all kinds of other causes in the history of our country. So conviction alone cannot be persuasive to impeach anybody.

The **PRESIDENT** pro tempore. The Chair submits the following question to both parties, first to the managers on the part of the House: Question by Mr. Cochran, first to the House managers.

> Was any evidence obtained during this impeachment proceeding that Federal prosecutors considered Judge Nixon a "big prize" because the Department of Justice was irritated and embarrassed by Judge Nixon's decision against the government in the Petit Bois Island case?

Mr. Manager **EDWARDS**. Mr. President, no such evidence was received. We knew about the Petit Bois matter. We have looked into it to some degree.

Skip Jarvis, referred to by Mr. Stewart, was the only evidence, if it could be called evidence, in his letter, that Judge Nixon was the big prize. He was not considered the big prize, to our knowlege, by the Federal investigators or the Federal prosecutors.

The **PRESIDENT** pro tempore. The same question is addressed to Judge Nixon:

Would the judge prefer that the Chair repeat the question?

Judge **NIXON**. Senator Cochran, I think the evidence shows that Mr. Stocks and Mr. Lewis made statements to the effects, to the news media, and other statements, that the Federal prosecutors stated that if they would give me to them, they did not have to be indicted. And I think that shows one of the things that was brought out, how relevant it was.

A parallel investigation was going on before the same, very same grand jury at the same time as this investigation, using the same grand jury. And that case was transferred to Birmingham for trial and they were both acquitted by the judge when they would not make the deal, when the prosecution went forth, because they would not—they stated they could not and would not give them the answers, give the Federal prosecutors the answers they wanted because it was simply not true. I was given nothing. There was no bribe, bribery; no improper action whatsoever.

The **PRESIDENT** pro tempore. The Chair is in receipt of only one remaining question that is addressed to Judge Nixon by Senator Mack. There is a lengthy premise.

At the criminal trial Judge Nixon testified as follows:

> Question. You told us that you went to that grand jury or when you were at the grand jury you were aware that you had seen Wiley on a night several years before, or I should say an afternoon, that you were at the farm and passed on the blackmail complaint of Wiley's to Bud Holmes, right?
>
> Answer. Right.
>
> Question. And that Bud then made a phone call to Wiley, which surprised you, but it did occur; right?
>
> Answer. Yes.
>
> Question. And you're in the grand jury. Were you aware at that time, did you remember those events?
>
> Answer. Yes.
>
> At the Senate proceedings Judge Nixon testified as follows:
>
> The **CHAIRMAN**. You told the grand jury that you never talked with anyone about the case; is that true or not?

Judge NIXON. Mr. Chairman in my judgment that is true, because I didn't talk about the case, I talked about the—going back and looking at it now, it was the blackmail matter. But, as I told you, I did not even recall that. I didn't recall March 11th events. It was nothing then, one little day in my life involving a few minutes that amounted to nothing, resulted in nothing, and apparently cleared up something, and I guess that is why I didn't recall it. But I did not recall it. I wish I had. I wish they had asked me a question concerning blackmail.

Now the question by Mr. Mack:

Could you reconcile your statements for the record?

Judge NIXON. Senator Mack, I think it is appropriate that I personally answer that question because I am the one who can answer it, the only one who can honestly say what was in my mind, what I meant by it.

I certainly had recollection. That is, I did not ever deny that these conversations took place. As I stated, they did. But I was aware of them, in other words. But as I stated it, they did not come to mind. They did not come to mind for several reasons. The primary reason was, I assume—and I have to go back and try to figure out why. No one can say why he did not remember something or it did not come to his mind, although it was in his recollection, because if it had, he would have said something about it.

But Weingarten, Mr. Weingarten told me before the interview that what he was investigating—and this is without dispute, no dispute—he was investigating whether my friend's oil and gas royalty purchase from Mr. Fairchild was imbalanced; the handling of the *Drew Fairchild* case on the Federal level. That is why it was not prosecuted by the Federal prosecutor and why it was steered or how it was steered and why, to State court, and whether there was a connection between these two events.

And that, in my mind, is what was being investigated. He told me that is what the focus was and, of course, all of the news media stories zeroed in on that. There was never any question about the blackmail; there was never any mention about the blackmail conversations; there was never anything in the news media about blackmail. So, consequently, my attention was focused and channeled in that direction by the prosecutor.

There is one more matter that I want to mention in answer to that question without going into too much detail. I knew they were investigating me on the charge of illegal gratuity. I knew, as a lawyer and a judge, that in order for there to be a crime of illegal gratuity there had to be an official act by a Federal judge, and certainly any conversation that I had with a State prosecutor or somebody else about a State court case could not and would not constitute an official act.

I guess for those reasons it did not come to mind. When it did come to mind when Holmes mentioned it in February, as Mr. Stewart said, I told him that certainly the call was made to Bud, despite the fact he was insinuating it was not, it was perfectly proper, unless you said something to Mr. Fairchild on the phone that I did not hear and I did not hear that conversation, if you read the testimony, because of the records being played, et cetera. Since there was no official act involved, and this took place in March of 1983, long after the oil and gas transaction was concluded in 1981, certainly it could not have pertained to what they told me they were investigating.

That is why it was in my recollect, of course, and I never denied that at all, but it did not come to mind at all in answer to those questions asked of me. If they had, certainly I would have answered because I had nothing to hide, for one thing; I had no motive. What motive would I have? I had done nothing wrong. That is proved by the evidence. I had not committed any corrupt act or any criminal act, whatsoever. The conversations with reference to blackmail were perfectly innocent conversations. So why would I lie to cover up my innocence? Why would I tell something intentionally false to cover up something I had not done?

The **President** pro tempore. Senator Exon submits the following question addressed to the House managers:

> The defense maintains that the prosecutors overreached to gain criminal conviction. Was this considered by the House in their action, and what is your answer to this allegation?

Mr. Manager **Edwards**. Mr. President, the defense never offered any proof or any evidence to the effect that Judge Nixon had not received a fair trial. When we got around to that, that was in the petition for *habeas corpus* to Judge Nangle, and a very thorough review of all of the allegations of prosecutorial misconduct, improper influencing of witnesses and so forth was examined in detail. All of the allegations were found to be false. Judge Nangle found against Judge Nixon, and his decision was affirmed by the appeals court.

The **President** pro tempore. This question is submitted by Senator **Kohl**. It is addressed to the House counsel.

> Assuming Judge Nixon concealed information from the grand jury, is this the same as perjury?

Mr. Manager **Edwards**. Mr. President, the managers firmly believe that if you make an affirmative statement to a grand jury and purposely leave material facts out, that would constitute perjury.

The **President** pro tempore. Senator Murkowski asks the following question of Judge Nixon:

> When you became aware of the conflict in your testimony, why did you not attempt to correct your testimony before the grand jury?

Judge **Nixon**. Senator Murkowski, first, there was no conflict in my testimony. Second, I think I have answered that.

At that time, we learned that I certainly was a target. I had gone before this grand jury at my request. The prosecutors knew they had no sufficient evidence of the illegal gratuity and pursued it. They had me indicted for it. They had me tried on the corruption charge, although they knew they could not sustain it.

By that time, my attorney and I, after discussing it, knew that no matter what I did by going back before the grand jury that I was marked, I was targeted and anything that I went back in there and said would not make any difference. I knew that I never intentionally lied about anything. I gave true answers based upon what I thought was the focus of the investigation at that time. I think anyone here would have done the same under the circumstances. The news media never, ever said anything about a blackmail allegation. There was never any question asked of me about a blackmail allegation. I knew that nothing with respect to that would constitute any kind of official act or crime on my part, and so there was no need to go back.

I would like to ask a question. If they thought it was improper, if they thought it was important, why did they not subpoena me or ask me to come back? I submit the reason was they did not want to pursue that, they did not want a clarification. They wanted an indictment, and they got a big prize, indictment.

Mr. **Stewart**. Mr. President, may I add one point on that?

The **President** pro tempore. Very well.

Mr. **Stewart**. I will be brief because this asked a question what I do for a living, which sometimes deals with targets of grand jury investigations and grand jury subpoenaes. If you are the target, you do not go before the grand jury without immunity, and you do not get immunity if you are the target or the big prize.

Judge Nixon's decision not to go before the grand jury in 1985 would not be second-guessed by any lawyer in this country who handles grand jury cases. In fact, what they would second-guess is the fact he went before the grand jury the first time. That is the action when he talked to a lawyer, they all said, "Oh, my God you mean he went in front of the grand jury?" You do not do that. They trap you. You get stuck. You make a mistake and they have you. His not going back in 1985 is absolutely something you cannot second-guess. Thank you, Mr. President.

The **President** pro tempore. The House managers will respond to this question by Mr. Bumpers.

If Judge Nixon had been a nextdoor neighbor and good friend and not a business partner from whom he had received a lucrative deal, would Judge Nixon's conduct have been improper?

Mr. Manager **Edwards**. Mr. President, that is a helpful question because it gets us back to the essence of the case. The House brings to the Senate charges of not telling the truth, the three impeachment counts. The three are all evidence of lies by a Federal judge. In each case, the lie is a felony, and that is what we are talking about in this case and that is all: lies to the interviewing officers, an FBI agent, an agent of the Internal Security Division of the Department of Justice, and lies under oath to a grand jury, all of which are confirmed by three witnesses and, in some instances, by Judge Nixon himself.

And each of the three witnesses support the other, and each of the three witnesses' testimony is basically consistent in every appearance.

The **President** pro tempore. Senator Thurmond has this question addressed to Judge Nixon and to the House managers.

Judge Nixon first.

Judge Nixon claims the conservation between him and Holmes occurred after the Fairchild case had been passed to file.

Was Fairchild still concerned with the blackmail matter after the case was passed to file? What was the purpose of Judge Nixon's mentioning this matter to Holmes at his farm if it had already been passed to file in December 1982 and Wiley Fairchild was aware of this?

Mr. **Stewart**. That is a very good question. Wiley Fairchild was still convinced he was blackmailed because the case came back out from the files. You see, what happened was in Christmas of 1982 Carroll Ingram showed up at the doorstep with this order passing the case to the files. Wiley thinks the case is over. Then 3 weeks later he got all the publicity; Judge McKenzie let's it slip that this order is passed to the files. The publicity hits and then Bud Holmes takes the case back out of files and puts it back on the active docket, and Wiley thinks he is getting jerked around, he thinks he is getting blackmailed. Yes, he did think he was getting blackmailed in March 1983 and in fact 13 months later, in April 1984, when he goes to the FBI, he still thinks he is being blackmailed. It is an excellent question and the answer is he thought he was being blackmailed throughout the case. Yes, sir.

The **President** pro tempore. Mr. Thurmond addressed the same question to the House managers.

Would the House managers like the question repeated?

Mr. Manager **Edwards**. No, I think not, Mr. President.

We believe that the evidence is overwhelming that the *Drew Fairchild* case was passed to the file after the meeting at the farm. It was discussed on the telephone call from the farm to Wiley Fairchild. And I think we ought to add, Mr. President, about the blackmail and the attempt by Mr. Stewart to confuse the matter by implying and stating that blackmail conversations had nothing to do with the *Drew Fairchild* case. Every time blackmail was brought up, it had to do only with the *Drew Fairchild* marijuana case.

In the committee, here in the Senate, the vice chairman asked Wiley Fairchild, "Mr. Stewart makes a very sharp distinction between discussions about blackmail, on the one hand, and discussions about your son's case, on the other hand. When you talked to Judge Nixon about blackmail, were you talking about something other than your son's case?" And Wiley Fairchild says, "no."

Along comes Senator Heflin. Senator Heflin says, "All right. So, was there any way that you could discuss the blackmail without mentioning your son's case?" This is a question again to Wiley Fairchild.

> **Wiley**: I don't see how I could have and got the point over.

Last, Mr. President, Judge Nixon draws a series of distinctions here which are fundamentally untenable. He talks about that we had a conversation but not a discussion. The facts are in his recollection but not in his memory. He described blackmail but not the *Drew Fairchild* case. You cannot discuss blackmail without discussing the *Drew Fairchild* case.

The **President** pro tempore. This question——

Mr. Stewart. I failed to answer part of Senator Thurmond's question.

The **President** pro tempore. The Chair will entertain additional comment.

Mr. **Stewart**. Thank you.

You asked why did Mr. Fairchild want to talk to Judge Nixon about blackmail, and I sat down too quickly. He wanted to talk to Judge Nixon because he knew he was a friend of Bud Holmes. He hoped Judge Nixon would pass on the message that Wiley didn't appreciate being blackmailed. That was it. That was the whole thing.

And in our brief, at page 79, is the testimony we have cited where Wiley Fairchild distinguished very clearly between blackmail conversation and talking about Drew's case.

The **PRESIDENT** pro tempore. Senator Cohen asks this question of Judge Nixon:

> When did you make the investments with Fairchild and way did you backdate the documents?

Judge **NIXON**. Whose question is that, Mr. President?

The **PRESIDENT** pro tempore. Let me repeat it.

Judge **NIXON**. Whose question? I remember the question. Who asked the question?

The **PRESIDENT** pro tempore. Senator Cohen.

Judge **NIXON**. Senator Cohen, my answer to that is this: I am aware of the fact that you—we have voluminous materials. You haven't had a chance to really look into them.

First of all, it is undisputed that the royalty transaction was agreed upon many months before the drug bust, to begin with. It was formalized after in writing, and they knew that Carroll Ingram was the person who told them. I had nothing to do with dating the instrument back. That is undisputed. It was brought to me in that fashion.

I asked Carroll Ingram why that was the case. And he stated that was customary in the oil and gas business so that was valid for several reasons. One is to establish the value of the purchase at the time that it was actually agreed upon because many things happened between that time and the time it was formalized. Every witness who testified, every witness, Wiley Fairchild, even Jarvis testified that that was customary in the oil and gas business. There was nothing wrong with it and, consequently, I was never, I was acquitted for that and many other reasons of the corruption charge.

The **PRESIDENT** pro tempore. The Chair is in possession of no additional questions.

Under the rule, the House closes the argument. The House has 33 minutes and 30 seconds remaining.

The House managers will please proceed.

Mr. Manager **EDWARDS**. Mr. President, the managers believe that the rebuttal was adequately covered in the questions and answers.

The House managers thank you, Mr. President, and Members for their courtesy and hospitality today, and we yield back the remainder of our time.

The **PRESIDENT** pro tempore. The majority leader.

Mr. **MITCHELL**. Mr. President, pursuant to impeachment rule XX, I move that upon the establishment of a quorum tomorrow, pursuant to the live quorum call starting at 1:45 p.m., the doors of the Senate be closed while the Senate is deliberating upon its decisions.

The **PRESIDENT** pro tempore. Without objection, the motion is agreed to.

Pursuant to the previous order, this concludes the Senate's consideration today of the articles of impeachment.

The Senate will begin its closed door deliberations on the pending motions and on the articles of impeachment tomorrow at 2 p.m. following the live quorum call that shall begin at 1:45 p.m.

SENATE ORDERS REGARDING CLOSED DELIBERATION ON THE IMPEACHMENT OF JUDGE WALTER L. NIXON, JR.

(From the Congressional Record—Senate, November 2, 1989)

CALL OF THE ROLL

The Presiding Officer. The clerk will call the roll to ascertain the presence of a quorum.

The legislative clerk proceeded to call the roll.

[Quorum No. 10]

Byrd
Conrad
Daschle
Garn
Graham
Jeffords
Kasten
Kennedy
Kohl
Metzenbaum
Robb
Sarbanes
Shelby
Simpson
Thurmond

The Presiding Officer. A quorum is not present. The clerk will call the names of the absent Senators.

The legislative clerk resumed the call of the roll and the following Senators entered the Chamber and answered to their names:

Cochran
Grassley
Pell

The President pro tempore. A quorum is not present. The clerk will call the names of the absent Senators.

The legislative clerk resumed the call of the roll and the following Senators entered the Chamber and answered to their names:

Adams
Armstrong
Baucus
Bentsen
Biden
Bingaman
Bond
Boren
Boschwitz
Bradley
Breaux
Bryan
Bumpers
Burdick
Burns
Chafee
Coats
Cohen
Cranston
D'Amato
Danforth
DeConcini
Dixon
Dodd
Dole
Domenici
Durenberger
Exon
Ford
Fowler
Glenn
Gore
Gorton
Gramm
Harkin
Hatch
Hatfield
Heflin
Heinz
Helms
Hollings
Humphrey
Inouye
Johnston
Kassebaum
Kerrey
Kerry
Lautenberg
Leahy
Levin
Lieberman
Lott
Lugar
Mack
McCain
McClure
McConnell
Mikulski
Mitchell
Moynihan
Murkowski
Nickles
Nunn
Packwood
Pressler
Pryor
Reid
Riegle
Rockefeller
Roth
Rudman
Sanford
Sasser
Simon
Specter
Stevens
Symms
Wallop
Warner
Wilson
Wirth

The President pro tempore. A quorum is present.

The majority leader is recognized.

PRIVILEGE OF THE FLOOR

Mr. MITCHELL. Mr. President, I ask unanimous consent that floor privileges during today's closed impeachment proceedings of Judge Walter L. Nixon, Jr., be granted to the individuals listed on the document I now send to the desk.

The PRESIDENT pro tempore. Without objection, it is so ordered.

The document follows:

SENATE

Martha Pope, Chief of Staff, Majority Leader.
Charles Kinney, Democratic Policy Committee.
George Carenbauer, Democratic Policy Committee.
Anita Jensen, Senator Mitchell.
Rebecca Roberts, Office of President pro tempore.
Roy Greenaway, Senator Cranston.
Alan Thomas, Senator Cranston.
Duke Short, Senator Thurmond.
Robert A. Bean, Assistant Secretary for Majority.
Jeanine Drysdale Lowe, Deputy Sergeant at Arms.
Loretta Fuller, Sergeant at Arms.
Sheila Burke, Chief of Staff, Republican Leader.
Robert Dove, Republican Leader's Staff.
Dennis Shea, Republican Leader's Staff.
Jim Whittinghill, Republican Leader's Staff.
Richard Quinn, Republican Leader's Staff.
Mike Tongour, Assistant Republican Leader's Staff.
John Doney, Assistant Secretary for the Minority.
Elizabeth Greene, Floor Assistant, Secretary for the Minority.
Michael Davidson, Senate Legal Counsel.
Morgan Frankel, Assistant Senate Legal Counsel & Committee Counsel.
Claire M. Sylvia, Assistant Senate Legal Counsel.
Jack Sousa, Rules Committee.
Jeff Peck, Judiciary Committee, Majority.
Jeff Nuechterlein, Judiciary Committee, Majority.
Terry Wooten, Judiciary Committee, Minority.
Thad Strom, Judiciary Committee, Minority.
Kevin Kayes, Assistant Parliamentarian.
Jim Weber, 2nd Assistant Parliamentarian.
Jennifer Smith, 3rd Parliamentarian.
David Tinsley, Assistant Journal Clerk.
Scott Bates, Assistant Legislation Clerk.
Scott Sanborn, Assistant Chief Reporter.
Frank A. Smonskey, Official Reporter.
Ronald Kavulick, Official Reporter.
Jerald D. Linnell, Official Reporter.
Raleigh Milton, Official Reporter.
Joel Breitner, Official Reporter.
Mary Jane McCarthy, Official Reporter.
Paul A. Nelson, Official Reporter.
Mark Lacovara, Staff Assistant, Official Reporter.
Kathy Drummond, Staff Assistant, Official Reporter.
Vince Del Balzo, Bill Clerk.

IMPEACHMENT COMMITTEE

Donald A. Purdy, Jr., Counsel.
Anthony L. Harvey, Administrator.
P. Casey McGannon, Staff Assistant and Exhibits Clerk.
Isabel T. McVeigh, Staff Assistant and Journal Clerk.

MEMBER'S STAFF REPRESENTATIVES

Bob Redding, Senator Fowler.

Scott Williams, Senator Heflin.
Ellen Marshall, Senator Wirth.
David Chartier, Senator Reid.
Kerry Walsh Skelly, Senator Robb.
Keenan Peck, Senator Kohl.
Kevin Dempsey, Senator Danforth.
Amy Dunathan, Senator Chafee.
John H. Moseman, Senator Murkowski.
Reginald E. Jones, Senator Jeffords.
Mary Beth Savary, Senator Mack.
Taylor Bowlden, Senator Symms.

CLOSED SESSION

The PRESIDENT pro tempore. Under the order, the Senate will now go into closed session, and the Chair, pursuant to rule XXI, now directs the Sergeant at Arms to clear all galleries, close all doors to the Senate Chamber, and exclude from the Chamber and its immediate corridors all employees and officials of the Senate who, under the rule, are not eligible to attend a closed session and who are not sworn to secrecy.

(At 2:03 p.m., the doors of the Chamber were closed. The proceedings of the Senate were held in closed session until 8 p.m.)

SENATE VOTES ON THE ARTICLES OF IMPEACHMENT AGAINST JUDGE WALTER L. NIXON, JR.

(From the Congressional Record—Senate, November 3, 1989)

QUORUM CALL

Mr. Mitchell. Mr. President, I suggest the absence of a quorum.

The Acting President pro tempore. The clerk will call the roll.

The legislative clerk proceeded to call the roll and the following Senators entered the Chamber and answered to their names:

[Quorum No. 11]

Armstrong
Boschwitz
Bryan
Bumpers
Byrd
Dixon
Dole
Hatfield
Kerrey
Kohl
Mitchell

The President pro tempore. A quorum is not present. The clerk will call the roll of the absentees.

Mr. Mitchell. Mr. President, I move that the Sergeant at Arms be instructed to request the attendance of absent Senators and I ask for the yeas and nays.

The President pro tempore. Is the demand sustained? Obviously the demand is sustained.

The yeas and nays are ordered and the clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. Cranston. I announce that the Senator from Oklahoma [Mr. Boren] and the Senator from New Jersey [Mr. Bradley] are necessarily absent.

Mr. Simpson. I announce that the Senator from Arizona [Mr. McCain] is necessarily absent.

The President pro tempore. Are there any other Senators in the Chamber who desire to vote?

The result was announced—yeas 96, nays 1, as follows:

[Rollcall Vote No. 283 Leg.]

YEAS—96

Adams
Armstrong
Baucus
Bentsen
Biden
Bingaman
Bond
Boschwitz
Breaux
Bryan
Bumpers
Burdick
Burns
Byrd
Chafee
Coats
Cochran
Cohen
Conrad
Cranston
D'Amato
Danforth
Daschle
DeConcini
Dixon
Dodd
Dole
Domenici
Durenberger
Exon
Ford
Fowler
Garn
Glenn
Gore
Gorton
Graham
Gramm
Grassley
Harkin
Hatch
Hatfield
Heflin
Heinz
Helms
Hollings
Inouye
Jeffords

Johnston
Kassebaum
Kasten
Kennedy
Kerrey
Kerry
Kohl
Lautenberg
Leahy
Levin
Lieberman
Lott
Lugar
Mack
Matsunaga
McClure
McConnell
Metzenbaum
Mikulski
Mitchell
Moynihan
Murkowski
Nickles
Nunn
Packwood
Pell
Pressler
Pryor
Reid
Riegle
Robb
Rockefeller
Roth
Rudman
Sanford
Sarbanes
Sasser
Shelby
Simon
Simpson
Specter
Stevens
Symms
Thurmond
Wallop
Warner
Wilson
Wirth

NAYS—1

Humphrey

NOT VOTING—3

Boren
Bradley
McCain

So the motion was agreed to.

The President pro tempore. A quorum is present. There will be order in the Senate.

IMPEACHMENT OF JUDGE WALTER L. NIXON, JR.

The President pro tempore. Under the previous order, the hour of 10 a.m. having arrived and a quorum having been established, the Senate will resume its consideration of the articles of impeachment against Judge Walter L. Nixon, Jr. The managers on the part of the House and respondent and his party will now take their places in the well in the Chamber.

The Deputy Sergeant at Arms will make the proclamation.

The Deputy Sergeant at Arms, Jeanine Drysdale-Lowe, made proclamation as follows:

> Hear ye! Hear ye! Hear ye! All persons are commanded to keep silence, on pain of imprisonment, while the Senate of the United States is sitting for the trial of the articles of impeachment exhibited by the House of Representatives against Walter L. Nixon, Jr., U.S. district judge for the Southern District of Mississippi.

The President pro tempore. The majority leader is recognized.

Mr. Mitchell. Mr. President, if I may have the attention of my colleagues.

The President pro tempore. The Senate will be in order. The majority leader is recognized.

Mr. Mitchell. Mr. President, we will this morning be voting on two motions and, depending upon the outcome of those motions, on three articles of impeachment. That means a maximum potential of five votes. In view of the importance of these proceedings, in the interest of fairness to all concerned and also in the interest of maintaining proper decorum in the Senate, I ask that Senators remain in their seats during the voting and respond when their name is called by the clerk. That will also have the added benefit of expediting the proceedings.

The first rollcall vote will, in accordance with our practices, be a 15-minute rollcall vote. The subsequent rollcall votes need only take such time as to permit each Senator to respond. Therefore, I urge Senators to remain in their seats during the voting and respond when their name is called by the clerk. That will also have the added benefit of expediting the proceedings.

Also, Mr. President, I ask unanimous consent that at any time in the proceeding which they choose, Judge Nixon and his counsel be permitted to excuse themselves.

The **President** pro tempore. Without objection, it is so ordered.

Mr. **Mitchell**. So counsel and the judge know that at any time they wish, following the completion of the vote, they may excuse themselves at any time.

Mr. President, the Senate deliberated yesterday for 6 hours on the articles of impeachment against Judge Walter L. Nixon, Jr. We meet this morning to vote on Judge Nixon's two pending motions and, depending upon the disposition of those motions, on the three articles of impeachment.

JUDGE NIXON'S MOTION FOR TRIAL BY THE SENATE

The **President** pro tempore. The Senate will now proceed to vote on Judge Nixon's first motion. The clerk will read Judge Nixon's motion for trial by the Senate.

The assistant legislative clerk read as follows:

Judge Nixon's Motion for Trial by the Senate

> Respondent Walter L. Nixon, Jr., through his undersigned attorneys, hereby moves that the Senate trial in this case be convened before and conducted in the presence of the entire body of the Senate, as required by article I, section 3, clause 6 of the Constitution, as set forth at greater length in the attached supporting Memorandum.

The **President** pro tempore. The majority leader is recognized.

Mr. **Mitchell**. Mr. President, I ask for the yeas and nays.

The **President** pro tempore. Is the demand sustained? Obviously, the demand is sustained.

The yeas and nays were ordered.

VOTE ON JUDGE NIXON'S MOTION FOR TRIAL BY THE SENATE

The **President** pro tempore. A "yea" vote would be in favor of granting Judge Nixon's motion. A "nay" vote would be in opposition to granting Judge Nixon's motion. The clerk will call the roll and please repeat the responses.

The legislative clerk called the roll.

Mr. **Cranston**. I announce that the Senator from Oklahoma [Mr. **Boren**] and the Senator from New Jersey [Mr. Bradley] are necessarily absent.

I further announce that, if present and voting, the Senator from New Jersey [Mr. Bradley] would vote "nay."

Mr. **Simpson**. I announce that the Senator from Arizona [Mr. McCain] is necessarily absent.

The **President** pro tempore. Are there any Senators who have not voted?

The result was announced—yeas 7, nays 90, as follows:

[Rollcall Vote 284]

(Judge Nixon's motion for trial by the Senate—Court of Impeachment—Judge Walter L. Nixon, Jr.)

YEAS—7

Heflin
Helms
Mack
Packwood
Sanford
Specter
Wallop

NAYS—90

Adams
Armstrong
Baucus
Bentsen
Biden
Bingaman
Bond
Boschwitz
Breaux
Bryan
Bumpers
Burdick
Burns
Byrd
Chafee
Coats
Cochran
Cohen
Conrad
Cranston
D'Amato
Danforth
Daschle
DeConcini
Dixon
Dodd
Dole
Domenici
Durenberger
Exon
Ford
Fowler
Garn
Glenn
Gore
Gorton
Graham
Gramm
Grassley
Harkin
Hatch
Hatfield
Heinz
Hollings
Humphrey
Inouye
Jeffords
Johnston
Kassebaum
Kasten
Kennedy
Kerrey
Kerry
Kohl
Lautenberg
Leahy
Levin
Lieberman
Lott
Lugar
Matsunaga
McClure
McConnell
Metzenbaum
Mikulski
Mitchell
Moynihan
Murkowski
Nickles
Nunn
Pell
Pressler
Pryor
Reid
Riegle
Robb
Rockefeller
Roth
Rudman
Sarbanes
Sasser
Shelby
Simon
Simpson
Stevens
Symms
Thurmond
Warner
Wilson
Wirth

ABSENT, NOT VOTING, OR EXCUSED FROM VOTING—3

Boren
Bradley
McCain

The PRESIDENT pro tempore. On this vote, there are 7 yeas, 90 nays. Judge Nixon's motion for trial by the Senate is denied.

JUDGE NIXON'S MOTION TO DISMISS IMPEACHMENT ARTICLE III

The PRESIDENT pro tempore. The clerk will now read Judge Nixon's motion to dismiss impeachment article III.

The legislative clerk read as follows:

> Judge Walter L. Nixon, Jr. through his undersigned counsel, hereby moves for an order of the Senate dismissing Impeachment Article III on the grounds stated:
>
> 1. The allegations that an impeachable offense has been made out if "Judge Nixon has raised substantial doubt as to his judicial integrity, undermined confidence in the integrity and impartiality of the judiciary, betrayed the trust of the people of the United States, * * * and brought disrepute on the Federal courts and the administration of justice by the Federal courts. * * *"
>
> These allegations do not make out an impeachable offense under Article II, sec. 4 of the Constitution.
>
> 2. Specifications III(2)(A), (D), (E), (F), and (G), which are redundant and multiplicitous of allegations in Impeachment Article I and Article II.
>
> 3. The Article, which charges five different offenses for each of fourteen specific events, thus present seventy allegations. Such a complex and confusing Article is both unfair and completely unworkable.

The PRESIDENT pro tempore. The majority leader is recognized.

Mr. MITCHELL. Mr. President, I ask for the yeas and nays.

The PRESIDENT pro tempore. Is the demand for the yeas and nays sustained? Obviously, the demand is sustained.

The yeas and nays were ordered.

VOTE ON JUDGE NIXON'S MOTION TO DISMISS IMPEACHMENT ARTICLE III

The PRESIDENT pro tempore. A yea vote would be in favor of granting Judge Nixon's motion. A nay vote would be in opposition to granting Judge Nixon's motion. The clerk will call the roll, and please repeat the response.

The assistant legislative clerk called the roll.

Mr. CRANSTON. I announce that the Senator from Oklahoma [Mr. Boren] and the Senator from New Jersey [Mr. Bradley] are necessarily absent.

I further announce that, if present and voting, the Senator from New Jersey [Mr. Bradley] would vote "nay."

Mr. SIMPSON. I announce that the Senator from Arizona [Mr. McCain] is necessarily absent.

The PRESIDENT pro tempore. Are there any Senators in the Chamber who have not voted or who wish to change their vote?

The result was announced—yeas 34, nays 63, as follows:

[Rollcall Vote No. 285]

(Judge Nixon's motion to dismiss impeachment article III—Court of Impeachment—Judge Walter L. Nixon, Jr.)

YEAS—34

Adams
Biden
Bingaman
Bryan
Burdick
Chafee
Conrad
Dixon
Dole
Domenici
Exon
Graham
Hatch
Hatfield
Heflin
Johnston
Kasten
Kerrey
Kerry
Kohl
Levin
Lieberman
Mack
McClure
Metzenbaum
Moynihan
Murkowski
Pryor
Reid
Sanford
Sasser
Simon
Symms
Wallop

NAYS—63

Armstrong
Baucus
Bentsen
Bond
Boschwitz
Breaux
Bumpers
Burns
Byrd
Coats
Cochran
Cohen
Cranston
D'Amato
Danforth
Daschle
DeConcini
Dodd
Durenberger
Ford
Fowler
Garn
Glenn
Gore
Gorton
Gramm
Grassley
Harkin
Heinz
Helms
Hollings
Humphrey
Inouye
Jeffords
Kassebaum
Kennedy
Lautenberg
Leahy
Lott
Lugar
Matsunaga
McConnell
Mikulski
Mitchell
Nickles
Nunn
Packwood
Pell
Pressler
Riegle
Robb
Rockefeller
Roth
Rudman
Sarbanes
Shelby
Simpson
Specter
Stevens
Thurmond
Warner
Wilson
Wirth

ABSENT, NOT VOTING, OR EXCUSED FROM VOTING—3

Boren
Bradley
McCain

The PRESIDENT pro tempore. On this vote, 34 Senators have voted in the affirmative, 63 Senators have voted in the negative. Therefore, Judge Nixon's motion to dismiss the impeachment article No. III is denied.

ARTICLE I

The PRESIDENT pro tempore. The clerk will now read the first article of impeachment.

The assistant legislative clerk read as follows:

ARTICLE I

On July 18, 1984, Judge Nixon testified before a Federal grand jury empaneled in the United States District Court for the Southern District of Mississippi (Hattiesburg Division) to investigate Judge Nixon's business relationship with Wiley Fairchild and the handling of the criminal prosecution of Fairchild's son, Drew Fairchild, for drug smuggling. In the course of his grand jury testimony and having duly taken an oath that he would tell the truth, the whole truth, and nothing but the truth, Judge Nixon did knowingly and contrary to his oath make a material false or misleading statement to the grand jury.

The false or misleading statement was, in substance, that Forrest County District Attorney Paul Holmes never discussed the Drew Fairchild case with Judge Nixon.

Wherefore, Judge Walter L. Nixon, Jr., is guilty of an impeachable offense and should be removed from office.

VOTE ON ARTICLE I

The PRESIDENT pro tempore. On this vote, the yeas and nays are automatic.

The Chair reminds the Senate that in voting on articles of impeachment, each Senator, when his or her name is called, would stand in his or her place and vote guilty or not guilty.

Senators how say you, is the respondent, Walter L. Nixon, Jr., guilty or not guilty?

The clerk will call the roll.

Mr. CRANSTON. I announce that the Senator from Oklahoma [Mr. BOREN] and the Senator from New Jersey [Mr. Bradley] are necessarily absent.

I further announce that, if present and voting, the Senator from New Jersey [Mr. Bradley] would vote "guilty."

Mr. SIMPSON. I announce that the Senator from Arizona [Mr. McCain] is necessarily absent.

The PRESIDENT pro tempore. Have all Senators voted?

The result was announced—guilty 89, not guilty 8, as follows:

[Rollcall Vote No. 286]

(Subject: Article I—Court of Impeachment—Judge Walter L. Nixon)

YEAS—89

Adams
Armstrong
Baucus
Bentsen
Biden
Bingaman
Bond
Boschwitz
Breaux
Bryan
Bumpers
Burdick
Burns
Byrd
Coats
Cochran
Cohen
Conrad
Cranston
D'Amato
Danforth
Daschle
DeConcini
Dixon
Dodd
Dole
Domenici
Durenberger
Exon
Ford
Fowler
Garn
Glenn
Gore
Gorton
Graham
Gramm
Grassley
Harkin
Hatch
Heflin
Heinz

Helms
Hollings
Humphrey
Inouye
Jeffords
Johnston
Kassebaum
Kasten
Kennedy
Kerrey
Kerry
Kohl
Lautenberg
Leahy
Levin
Lieberman
Lott
Lugar
Matsunaga
McConnell
Metzenbaum
Mikulski
Mitchell
Moynihan
Murkowski
Nickles
Nunn
Packwood
Pressler
Pryor
Reid
Riegle
Robb
Rockefeller
Roth
Rudman
Sarbanes
Shelby
Simon
Simpson
Specter
Stevens
Thurmond
Wallop
Warner
Wilson
Wirth

NAYS—8

Chafee
Hatfield
Mack
McClure
Pell
Sanford
Sasser
Symms

ABSENT, NOT VOTING, OR EXCUSED FROM VOTING—3

Boren
Bradley
McCain

The President pro tempore. On the first article of impeachment, 89 Senators have voted guilty, 8 Senators have voted not guilty. Two-thirds of the Members present having voted guilty, the Senate accordingly adjudges that the respondent, Walter L. Nixon, Jr., is guilty as charged in this first article.

ARTICLE II

The President pro tempore. The clerk will now read the second article of impeachment.

The legislative clerk read as follows:

Article II

On July 18, 1984, Judge Nixon testified before a Federal grand jury empaneled in the United States District Court for the Southern District to Mississippi to investigate Judge Nixon's business relationship with Wiley Fairchild and the handling of the prosecution of Fairchild's son, Drew Fairchild, for drug smuggling. In the course of his grand jury testimony and having duly taken an oath that he would tell the truth, the whole truth, and nothing but the truth, Judge Nixon did knowingly and contrary to his oath make a material false or misleading statement to the grand jury.

The false or misleading statement was, in substance, that Judge Nixon had nothing whatsoever officially or unofficially to do with the Drew Fairchild case in Federal court or State court; and that Judge Nixon "never handled any part of it, never had a thing to do with it at all, and never talked to anyone, State or Federal prosecutor or judge, that in any way influenced anybody" with respect to the Drew Fairchild case.

Wherefore, Judge Walter L. Nixon, Jr., is guilty of an impeachable offense and should be removed from office.

VOTE ON ARTICLE II

The President pro tempore. Senators how say you? Is the respondent, Walter L. Nixon, Jr., guilty or not guilty?

The clerk will call the roll, and please repeat the responses.

The assistant legislative clerk called the roll.

Mr. Cranston. I announce that the Senator from Oklahoma [Mr. Boren] and the Senator from New Jersey [Mr. Bradley] are necessarily absent.

I further announce that, if present and voting, the Senator from New Jersey [Mr. Bradley] would vote "guilty."

Mr. Simpson. I announce that the Senator from Arizona [Mr. McCain] is necessarily absent.

The result was announced—guilty 78, not guilty 19, as follows:

[Rollcall Vote No. 287]

(Subject: Article II—Court of Impeachment—Judge Walter L. Nixon, Jr.)

GUILTY—78

Adams
Baucus
Bentsen
Biden
Bingaman
Bond
Boschwitz
Breaux
Bryan
Bumpers
Burdick
Burns
Byrd
Coats
Cohen
Conrad
Cranston
D'Amato
Danforth
Daschle
DeConcini
Dixon
Dodd
Exon
Ford
Fowler
Garn
Glenn
Gore
Gorton
Graham
Gramm
Grassley
Harkin
Hatch
Heflin
Heinz
Helms
Hollings
Humphrey
Inouye
Johnston
Kassebaum
Kasten
Kennedy
Kerrey
Kerry
Kohl
Lautenberg
Leahy
Levin
Lieberman
Lugar
Matsunaga
McConnell
Metzenbaum
Mikulski
Mitchell
Moynihan
Nickles
Nunn
Pressler
Pryor
Reid
Riegle
Robb
Rockefeller
Roth
Rudman
Sarbanes
Shelby
Simon
Simpson
Specter
Stevens
Warner
Wilson
Wirth

NOT GUILTY—19

Armstrong
Chafee
Cochran
Dole
Domenici
Durenberger
Hatfield
Jeffords
Lott
Mack
McClure
Murkowski
Packwood
Pell
Sanford
Sasser
Symms
Thurmond
Wallop

ABSENT, NOT VOTING, OR EXCUSED FROM VOTING—3

Boren
Bradley
McCain

The President pro tempore. All Senators having voted, on the second article of impeachment, 78 Senators have voted guilty; 19 Senators have voted not guilty.

Two-thirds of the Members present having voted guilty, the Senate adjudges that the respondent, Walter L. Nixon, Jr., is guilty as charged in this article.

ARTICLE III

The President pro tempore. The clerk will now read the third article of impeachment.

The assistant legislative clerk read as follows:

ARTICLE III

By virtue of his office as a judge of the United States District Court for the Southern District of Mississippi, Judge Nixon is required to uphold the integrity of the judiciary, to avoid impropriety and the appearance of impropriety, and to obey the laws of the United States.

Judge Nixon has raised substantial doubt as to his judicial integrity, undermined confidence in the integrity and impartiality of the judiciary, betrayed the trust of the people of the United States, disobeyed the laws of the United States and brought disrepute on the Federal courts and the administration of justice by the Federal courts by the following:

After entering into an oil and gas investment with Wiley Fairchild, Judge Nixon conversed with Wiley Fairchild, Carroll Ingram, and Forrest County District Attorney Paul Holmes concerning the State criminal drug conspiracy prosecution of Drew Fairchild, the son of Wiley Fairchild, and thereafter concealed those conversations as follows:

(1) Judge Nixon concealed those conversations through one or more material false or misleading statements knowingly made to an attorney from the United States Department of Justice and a special agent of the Federal Bureau of Investigation during an interview of Judge Nixon conducted in Biloxi, Mississippi, on April 19, 1984. The substance of the false or misleading statements included the following:

(A) Judge Nixon never discussed with Wiley Fairchild anything about Wiley's son's case.

(B) Wiley Fairchild never brought up his son's case.

(C) At the time of the interview Judge Nixon had no knowledge of the Drew Fairchild case and did not even know Drew Fairchild existed, except for what the judge previously read in the newspaper and what he learned from the questioners in the interview.

(D) Nothing was done or nothing was ever mentioned about Wiley Fairchild's son.

(E) Judge Nixon had never heard about the Drew Fairchild case, except what he told the questioners in the interview, and certainly had nothing to do with the case.

(F) Judge Nixon had done nothing to influence the Drew Fairchild case.

(G) State prosecutor Paul Holmes never talked to Judge Nixon about the Drew Fairchild case.

(2) Judge Nixon further concealed his conversations with Wiley Fairchild, Paul Holmes, and Carroll Ingram concerning the Drew Fairchild case by knowingly giving one or more material false or misleading statements to a Federal grand jury during testimony under oath in Hattiesburg, Mississippi, on July 18, 1984. The substance of the false or misleading statements included the following:

(A) Paul Holmes never discussed the Drew Fairchild case with Judge Nixon.

(B) To the best of his knowledge and recollection, Judge Nixon did not know of any reason he would have met with Wiley Fairchild after the Nixon-Fairchild oil and gas investment was finalized in February 1981.

(C) Judge Nixon gave the grand jury all the information that he had and that he could and had withheld nothing during his grand jury testimony.

(D) Judge Nixon had nothing whatsoever unofficially to do with the Drew Fairchild criminal case in State court.

(E) Judge Nixon never talked to anyone, including the State prosecutor, about the Drew Fairchild case.

(F) Judge Nixon never had a thing to do with the Drew Fairchild case at all.

(G) Judge Nixon "never talked to anyone, State or Federal, prosecutor or judge, in any way influence anybody" with respect to the Drew Fairchild case.

Wherefore, Judge Walter L. Nixon, Jr., is guilty of an impeachable offense and should be removed from office.

VOTE ON ARTICLE III

The PRESIDENT pro tempore. Senators, how say you? Is the respondent, Walter L. Nixon, Jr., guilty or not guilty?

The clerk will call the roll on the third article of impeachment, and please repeat the responses.

The legislative clerk called the roll.

Mr. CRANSTON. I announce that the Senator from Oklahoma [Mr. Boren] and the Senator from New Jersey [Mr. Bradley] are necessarily absent.

I further announce that, if present and voting, the Senator from New Jersey [Mr. Bradley] would vote "guilty."

Mr. SIMPSON. I announce that the Senator fom Arizona [Mr. McCain] is necessarily absent.

The result was announced—guilty 57, not guilty 40, as follows:

[Rollcall Vote No. 288]

(Subject: Article III—Court of Impeachment—Walter L. Nixon, Jr.)

GUILTY—57

Armstrong
Bentsen
Bond
Boschwitz
Breaux
Bumpers
Byrd
Coats
Cochran
Cohen
D'Amato
Danforth
Daschle
DeConcini
Dodd
Durenberger
Ford
Fowler
Garn
Glenn
Gore
Gorton
Gramm
Grassley
Heinz
Helms
Hollings
Humphrey
Inouye
Jeffords
Kassebaum
Kennedy
Lautenberg
Leahy
Lott
Lugar
Matsunaga
McConnell
Mikulski
Mitchell
Nickles
Pell
Pressler
Riegle
Robb
Rockefeller
Roth
Rudman
Sarbanes
Shelby
Simpson
Specter
Stevens
Thurmond
Warner
Wilson
Wirth

NOT GUILTY—40

Adams
Baucus
Biden
Bingaman
Bryan
Burdick
Burns
Chafee
Conrad
Cranston
Dixon
Dole
Domenici
Exon
Graham
Harkin
Hatch
Hatfield
Heflin
Johnston
Kasten
Kerrey
Kerry
Kohl
Levin
Lieberman
Mack
McClure
Metzenbaum
Moynihan
Murkowski
Nunn
Packwood
Pryor
Reid
Sanford
Sasser
Simon
Symms
Wallop

ABSENT, NOT VOTING, OR EXCUSED FROM VOTING—3

Boren
Bradley
McCain

The PRESIDENT pro tempore. Have all Senators in the Chamber voted?

Upon this article of impeachment, 57 Senators having voted guilty, 40 Senators having voted not guilty, less than two-thirds of the Members present having voted guilty, the Senate adjudges that the respondent, Walter L. Nixon, Jr., is not guilty as charged in the third article of impeachment.

The Chair directs judgment to be entered in accordance with the vote of the Senate, as follows:

The Senate, having tried Walter L. Nixon, Jr., U.S. district judge for the Southern District of Mississippi, upon three articles of impeachment exhibited against him by the House of Representatives, and two-thirds of the Senators present having found him guilty of the charges contained in articles I and II of the articles of impeachment, it is, therefore, ordered and adjudged that the said Walter L. Nixon, Jr., be, and he is hereby, removed from office.

The majority leader is recognized.

Mr. MITCHELL. Mr. President, I send to the desk an order.

The PRESIDING pro tempore. The clerk will report the order.

The legislative clerk read as follows:

> *Ordered,* That the Secretary be directed to communicate to the Secretary of State, as provided by rule XXIII of Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, and also to the House of Representatives the judgment of the Senate in the case of Walter L. Nixon, Jr., and transmit a certified copy of the judgment to each.

The PRESIDENT pro tempore. Without objection, the order will be entered and adjudged.

In the Senate of the United States,

November 3 (legislative day, September 18), 1989

JUDGMENT

The Senate having tried Walter L. Nixon, Jr., United States District Judge for the Southern District of Mississippi, upon three Articles of Impeachment exhibited against him by the House of Representatives, and two-thirds of the Senators present having found him guilty of the Charges contained in Articles I and II of the Articles of Impeachment: it is therefore,

Ordered and adjudged, That the said Walter L. Nixon, Jr be, and he is hereby, removed from office.

Attest:

Walter J. Stewart

Secretary.

By

Assistant Secretary

In the Senate of the United States,

November 3 (legislative day, September 16), 1989

Ordered, That the Secretary be directed to communicate to the Secretary of State, as provided by Rule XXIII of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, and also to the House of Representatives the judgment of the Senate in the case of Walter L. Nixon, Jr., and transmit a certified copy of the judgment to each.

Attest:

Walter J. Stewart

Secretary.

By:

Assistant Secretary

STATEMENTS OF SENATORS FOR THE RECORD REGARDING THE IMPEACHMENT TRIAL OF JUDGE WALTER L. NIXON, JR.

AUTHORIZATION FOR FILING STATEMENTS IN THE CONGRESSIONAL RECORD REGARDING THE IMPEACHMENT TRIAL OF JUDGE WALTER L. NIXON, JR.

Mr. MITCHELL. Mr. President, I ask unanimous consent that Senators may be permitted within 7 days from today to have printed in the record opinions or statements explaining their votes.

The PRESIDENT pro tempore. Without objection, it is so ordered.

STATEMENT OF SENATOR CARL LEVIN

(From the Congressional Record—Senate, November 3, 1989)

Mr. LEVIN. Mr. President, in the matter of the impeachment of Judge Walter Nixon, I decided to vote for conviction on the basis of articles I and II.

Articles I and II allege that Judge Nixon made false and misleading statements to a Federal grand jury. Both counts are based upon Federal criminal charges for which Judge Nixon was found guilty in 1986 after a trial by jury. His appeals of this conviction have been exhausted, and he is now serving a sentence of 5 years imprisonment for his crimes. I have reviewed the facts and record underlying the conviction and find that they support the jury's finding of wrongdoing. Thus, I accept the jury's finding of guilt as evidence of Judge Nixon's making false and misleading statements to the grand jury as set forth in articles I and II.

A criminal conviction is not conclusive, in and of itself, of a person's guilt in an impeachment proceeding. Nor does it relieve the Senate of its responsibility to determine whether a respondent has committed high crimes and misdeameanors which justify removal from office. At the same time, a guilty verdict reached in accordance with American principles of criminal justice, after due process, is not devoid of significance. It represents the unanimous, considered finding of an impartial panel of American citizens charged to reach this verdict only when the evidence of guilt is beyond a reasonable doubt. It demands our attention.

The level of proof required for a criminal conviction—beyond a reasonable doubt—is tougher than what is required for the Senate to remove an official from office. The due process requirements in a criminal matter—including the right to a jury trial—are tougher than those applicable in an impeachment proceeding. These extra safeguards are constitutional requirements to protect the presumption of innocence and permit criminal sanctions only when clearly deserved. It also means that when a finding of guilt occurs in a criminal proceeding and in accordance with our laws, we can view it as a prudent determination reached in the context of many protections for the defendant.

Some have suggested that, in deciding the matter of Judge Nixon's impeachment, we should not consider his criminal conviction. I disagree. Given the higher burden of proof and stronger due process protections that apply to a criminal trial, it is appropriate that we take note of the guilty verdict and consider the jury's finding of criminal wrongdoing as evidence of the high crimes and misdemeanors charged in the impeachment, provided that we are satisfied that the record supports the verdict, due process was accorded, and the wrongdoing at issue is sufficient to warrant removal from office.

The Constitution gives the Senate "the sole power to try all impeachments" and states that "the trial of all crimes except impeachment shall be by jury." (Article I, Section 3; and Article II, Section 2.) These provisions require the Senate to act as the factfinder in each impeachment proceeding—since factfinding is at the heart of trying any case—and to determine, as individuals and as a body, whether the respondent is guilty of high crimes and misdemeanors so as to require removal from office.

While we cannot abdicate our responsibility as factfinders by deeming guilty verdicts to be conclusive evidence of high crimes and misdemeanors, neither are we required to ignore a guilty verdict in a criminal trial on the same charges that underlie an article of impeachment. Indeed, by framing articles which repeat criminal charges, the House invites us to make the connection between the two proceedings.

Would we be here but for Judge Nixon's conviction? I doubt it, since there is a reasonably supportable, benign explanation of his testimony before the grand jury. But what is clear and convincing—what is true beyond a reasonable doubt—what is true beyond any doubt—is that following a fair hearing Judge Nixon was convicted of perjury based on the very same statements before us in this impeachment proceeding.

In the impeachment involving Judge Harry Claiborne, one of the articles of impeachment asked the Senate to remove him from office because of his prior criminal conviction. The format of that article was and is the most forthright way to proceed in a case of impeachment following a criminal conviction. The Senate, however, by a vote of 46 guilty, 17 not guilty and 35 present, failed to adopt that article in the Claiborne matter, apparently because some felt its wording did not give enough recognition to the Senate's obligation to act as an independent factfinder and to go behind any criminal conviction. But I believe, if we examine a relevant guilty verdict, determine that the record supports it and that due process was provided, while we are not bound to follow it, we can, if we choose, rely on it to provide the factual determination needed to vote guilty on an article of impeachment. I choose to do so in this matter, because of my belief that the Federal judiciary should not include persons recently convicted of serious crimes after a fair trial, where the record supports the guilty verdict and the person's appeals have been exhausted.

The practice of factfinders relying on findings made in other legal proceedings is called collateral estoppel and is a long-standing, well-established principle of American law. I believe it is particularly appropriate for us to use that doctrine in the matter of Judge Nixon, because of the Senate's refusal to allow him to conduct an impeachment trial before the full Senate. Because most of us were not members of the Senate committee that heard the evidence in this matter and were not present to evaluate the demeanor of the witnesses, we are at a disadvantage in making the factual findings required by this proceeding. Under such circumstances, I believe it is even more appropriate to rely heavily on the criminal conviction of Judge Nixon, where the jury heard all of the evidence and reached a unanimous conclusion on the very issues before us, using the toughest standard of proof required in the American legal system.

A distinction should be made here between criminal trials which result in a finding of "guilty" versus a finding of "not guilty." A finding of guilt is made only when a jury unanimously agrees that the evidence demonstrates beyond a reasonable doubt that a crime was committed. A "not guilty" verdict results whenever a jury is not convinced that the evidence reaches this high level of proof. And because of that high level of proof in criminal trials, one cannot equate a finding of "not guilty" with a finding of innocence. That is why a verdict of "not guilty" in a criminal trial does not restrict the Senate's freedom to act on articles of impeachment, as in the case involving Judge Alcee Hastings. Evidence which may not sustain a finding of criminal guilt may yet be sufficient to satisfy us that a person should be removed from office.

I did not vote for conviction on article III, because much of that article depends upon statements made by Judge Nixon during an interview with the Department of Justice in April 1984. These statements were not part of the criminal charges for which Judge Nixon was convicted. The judge's statements to the grand jury took place almost 3 months after the interview, after he had time to recollect and think through his answers so as not to be misleading. The record amply supports the finding in the criminal trial that Judge Nixon's statements to the grand jury were false and misleading and constituted perjury. Those are the statements cited in articles I and II, and it is on those articles that I vote to convict Judge Nixon and remove him from office.

There is one last point. I voted no on Judge Nixon's motion for a full trial before the Senate because I based my vote to remove Judge Nixon from office primarily on his criminal conviction following a fair trial and the exhaustion of his appeals. If there were no prior conviction, it would be my inclination, upon the request of a respondent, to grant a trial before the full Senate or for the respondent to testify under oath before the full Senate, unless either the witnesses' credibility were not a significant factor in the proceeding or unless I were on the impeachment committee which personally heard the testimony and no other Senator, who was not a committee member, sought such a hearing or testimony before the full Senate.

STATEMENT OF SENATOR TERRY SANFORD

(From the Congressional Record—Senate, November 3, 1989)

Mr. SANFORD. Mr. President, it has been obvious since the first session that Judge Walter L. Nixon, Jr., was going to be impeached. Even if the Senate were to conclude that he had been unjustly convicted by the jury, it would be difficult to return to the Federal bench a judge with a cloud of conviction for perjury, a particularly odious offense for the judicial system.

Understanding he would indeed be impeached, I decided to vote to acquit Judge Walter L. Nixon, Jr., to protest this criminal investigative device of failing to establish a real crime, and then searching around in the ashes for bits of perjury. I also voted to acquit because: First, the false statements, if made, were of trivial matters not related to an actual crime; second, the case against Judge Nixon was contrived and manufactured by the Justice Department, and third, grounded, at least in part, on testimony written for a key witness by Justice Department employees.

It is more than regrettable that the Justice Department made a criminal of this judge.

STATEMENT OF SENATOR CHARLES E. GRASSLEY

(From the Congressional Record—Senate, November 3, 1989)

Mr. GRASSLEY. Mr. President, impeachment, as provided for in Article II, Section 4 of the Constitution, is not a criminal proceeding, even though the Constitution makes use of traditional criminal law terminology, such as:

Removal from office on "conviction of treason, bribery, or other high crimes and misdemeanors" (Article II, Section 4), or

"The Trial of all crimes, except in cases of impeachment, shall be by jury" (Article III, Section 2(3)), or

The President's power to grant "pardons for offenses against the United States, except in cases of impeachment" (Article II, Section 2(1)).

Nor is impeachment designed to further punish one already convicted of a felony and serving a sentence for that conviction, such as Walter L. Nixon.

Rather, impeachment, a solemn and grave exercise of granted power, is a remedial measure entrusted to Congress by the Constitution.

The power of impeachment enables Congress, by removing from office those persons unfit to hold high positions of public trust, to protect the public.

Although the great power of removal from office is rarely employed, the Congress should not retreat from the proper exercise of its constitutional responsibilities, after the careful weighing of all evidence, when warranted.

A lifetime appointment to the Federal bench, as provided by Article III of the Constitution, is a civil office of public trust (as described in Article II) that is subject to the legislative branch's article I power of impeachment.

A Federal judge is not confirmed directly by the people through the electoral process. Rather, a Federal judge is confirmed by the appointment process, mandated by the Constitution to be exercised by the executive and legislative branches.

To be entrusted with a lifetime office that has the potential power of depriving individuals of their liberty and property, is, indeed, a very great responsibility.

Consequently, a Federal judge must subscribe to the highest ethical and moral standards. At a minimum, in their words and deeds, judges must be beyond reproach or suspicion in order for there to be integrity and impartiality in the administration of justice and independence in the operation of our judicial system.

Has Judge Nixon met the standard?

The judge became the subject of a Federal investigation due to his financial dealings with a Mississippi businessman, Wiley Fairchild, and his (Nixon's) involvement with the prosecutor, Paul "Bud" Holmes, in a State criminal case involving drug smuggling—the defendant in the case being Fairchild's son, Drew.

Based upon a 1984 FBI-Department of Justice interview and later sworn testimony before a Federal grand jury regarding his financial dealings with Wiley Fairchild and his alleged involvement with the State criminal case against Drew Fairchild, the judge was indicted on one count of accepting an unlawful gratuity and three counts of perjury in 1985.

He subsequently was convicted by a Federal jury in February 1986, of two counts of perjury and sentenced to 5 years in prison. He was aquitted of the other counts. He is currently serving that sentence.

The fifth circuit upheld his conviction, including his postconviction allegations of prosecutorial misconduct. That court also concluded the judge received a fair trial. His petition for certiorari has been denied by the Supreme Court.

In May 1989—after having exhausted all of his procedural remedies and based upon a recommendation of removal from office by the U.S. Judicial Conference—the House voted 417-0 in favor of three articles of impeachment against Judge Nixon.

Criminal conduct, prosecution, and conviction is not a prerequisite for impeachment. Office holders have been removed from office for conduct that was not a violation of the criminal law.

However, in order to find Judge Nixon not guilty, we must defer to the judge's defense against the articles of impeachment, by resolving every ambiguity in this case in his favor.

Among other points, the judge contends that:

His testimony has been completely consistent throughout his case. He literally never spoke with "Bud" Holmes about the *Drew Fairchild* case;

While testifying before the grand jury, he did not think of any conversation with Wiley Fairchild, either in person or over the telephone with "Bud" Holmes, but they were somewhere in his memory, they just never came to his mind;

The House managers have given no plausible basis for concluding that he purposefully concealed his conversations with Wiley Fairchild and "Bud" Holmes. In other words, we must find that it is plausible that he had the conversations in his memory, but they just never came to his mind;

Therefore, his testimony before the grand jury was literally true. He did have conversations, but they were of no significance to him, so they did not come to his mind;

The House managers are demanding testimonial perfection from him, when no prosecution witness originally thought of the Nixon-Fairchild-Holmes conversations during their testimony before the grand jury;

The date of the conversations is not before Drew Fairchild's case was "passed to the file," but sometime thereafter—meaning the judge could not have influenced the case;

The House's case relies on the testimony of Wiley Fairchild and "Bud" Holmes, whose eventual plea bargains cast doubts upon their credibility;

The information he supposedly withheld during his interview and grand jury testimony was of no particular significance, nor was it material. Therefore, the conversations in question constitute no offense; and

He was targeted for prosecution because he ruled against the Government in an unrelated case and that the Department of Justice engaged in prosecutorial misconduct against him.

Whatever burden of proof individual Senators may utilize, common sense does not allow me to conclude that Judge Nixon's version of the facts squares with the case against him.

His conduct from the time of his initial aquaintance with Wiley Fairchild just doesn't make any sense to me.

Judge Nixon asks that the Senate believe the semantic and technical differences he employs to explain his testimony before the grand jury. At various stages of his arguments, these grand jury statements are either honest mistakes, or they were made with information he claims was somewhere in his memory, but just never came to his mind.

Could it be that Judge Nixon's statements before the grand jury were premeditated?

It should be remembered that the jury at his criminal trial apparently determined that Judge Nixon's arguments regarding the nature of his statements were transparencies.

Judge Nixon is asking the Senate to do something the Fifth Circuit Court of Appeals would not do, and something the Supreme Court would not even consider doing. And he is asking the Senate to do something it does not have the power to do.

In essence, Judge Nixon is asking the Senate to overturn the verdict of the jury empaneled to hear the case against him.

My colleagues must be mindful of the result if they find Judge Nixon not guilty of the articles of impeachment brought by the House of Representatives. Upon his release from Federal custody, the Senate would be sending a convicted felon to the Southern District of Mississippi to sit in judgment of others who may come before him.

Mr. President, the evidence belies Judge Nixon's version of the facts. His statements regarding this matter demonstrate that he doesn't deserve the high privilege of sitting on the Federal bench. He no longer should hold the office entrusted to him over 20 years ago by the people through this body.

I will, therefore, vote guilty on the articles of impeachment against Judge Walter Nixon.

The PRESIDENT pro tempore. The majority leader.

Mr. MITCHELL. Mr. President, I move that the Senate, sitting as a court of impeachment of the articles of impeachment against Walter L. Nixon, Jr., adjourn sine die.

The PRESIDENT pro tempore. Without objection, it is so ordered, and the Senate, sitting as a court of impeachment on the articles against Walter L. Nixon, Jr., now adjourns sine die.

(Thereupon, at 11:29 a.m., the Senate, sitting as a court of impeachment, adjourned sine die.)

STATEMENT OF SENATOR HERBERT H. KOHL

(From the Congressional Record—Senate, November 3, 1989)

Mr. Kohl. Mr. President, I would like to share my thoughts as a member of the Impeachment Trial Committee. First, however, let me say that Senators Fowler and Danforth conducted the proceedings very effectively and very fairly. Judge Nixon clearly received due process, and I commend my colleagues.

I want to begin by discussing Judge Nixon's motion to dismiss article III. Then I will address the question of Judge Nixon's guilt or innocence.

Judge Nixon essentially makes two arguments with respect to article III—that it's unconstitutional and that its unfair. I do not accept his first argument, but I agree with the second. And it's unnecessary to decide the constitutional question if we believe that article III is in fact unfair. We can and should dismiss it on that ground alone.

Article III is phrased in the disjunctive. It says that Judge Nixon concealed his conversations through "one or more" of 14 false statements. This wording presents a variety of problems. First of all, it means that Judge Nixon can be convicted even if two thirds of the Senate does not agree on which of his particular statements were false. The House managers admitted this. In theory, then, Judge Nixon could be found guilty even if 95 Senators conclude that he told the truth in each of the 14 statements. After all, it takes just 5 Senators on each of the statements to convict by a two thirds majority.

The House is telling us that it's OK to convict Judge Nixon on article III even if we have different visions of what he did wrong. But that's not fair to Judge Nixon, to the Senate, or to the American people. Let's say we do convict on article III. The American people—to say nothing of history—would never know exactly which of Judge Nixon's statements we regarded as untrue. They'd have to guess. What's more, this ambiguity would prevent us from being totally accountable to the voters for our decision.

The House managers tried to answer our concern by saying that we can explain our votes in the Record. This is not satisfactory. Our vote should speak for itself. Although it may be desirable to explain our conclusions, we should not have to do so. It's also unrealistic to expect every Senator to describe his or her thought process in detail.

Article III reminds me of the kind or menu that some Chinese restaurants use. We are asked to choose a combination of selections from column "A" and from column "B." This complicates our deliberations, and it puts a tremendous burden on the accused.

I realize that we have used omnibus articles before. But they did not contain the word "OR," and they did not allege 14 crimes. In the Claiborne case, for example, the omnibus article accused him of just two crimes—falsifying tax returns in 1979 and 1980.

But my basic objection is more fundamental: the prosecution should not be allowed to use a shotgun or blunderbuss. We should send a message to the House: "Please do not bunch up your allegations. From here on out, charge each act of wrongdoing in a separate count. Follow the example of prosecutors in court." Such a change would clarify things and allow for a cleaner vote on guilt or innocence. And it would not interfere with the House's constitutional duties. In sum, even if article III is technically permissible under the Constitution, Congress can do better.

I would like to switch gears at this point and talk about the underlying issue—whether Judge Nixon ought to be convicted on articles I and II.

You all know the story by now, and you've heard some excellent analyses of the evidence. Let me start with intangibles. We cannot convict a man on intangibles, but I think they are important to seeing the big picture. My impression is that Judge Nixon is not a bad or evil person. Instead, Judge Nixon struck me as someone who dug himself into a hole—and then kept digging when he realized he was stuck. He's probably not a liar at heart; but in my judgment, he did lie in this instance.

In objective terms, Judge Nixon had no motive to lie to Federal investigators or the grand jury. He did not do anything illegal in talking to Wiley Fairchild or Bud Holmes. Dumb, perhaps, but not unlawful. Judge Nixon broke no law by telling Holmes about Fairchild's blackmail allegation. And it was probably even legal for Judge Nixon to put in a "good word" for Drew Fairchild with Bud Holmes. Since Judge Nixon sat on the Federal bench, he could properly talk about a State case—especially to an old friend in a tightly knit community. That's why he was never charged with wrongdoing for having these discussions. That's why Yale Law Professor Geoffrey Hazard gave him a clean bill of health on the conversations.

But that's the objective reality. And Judge Nixon, like the rest of us, sees things subjectively, or from his own vantage point. I believe that Judge Nixon thought his conversations were improper or would look bad. It's easy to see why. He gets a good oil deal from Wiley Fairchild—a deal acquired primarily because he was a Federal judge. He promises Wiley that he will help him if he can. And then, when Wiley's son is busted, Judge Nixon puts in a "good word" with the prosecutor. Any public official could easily see how bad this would look in the media. The story would play very, very poorly.

And so I believe Judge Nixon tried to keep his discussions from the authorities. He began digging his hole in that first interview with the prosecutor and FBI. Then he got in deeper in front of the grand jury. And later, at his criminal trial and during the impeachment—when he's spotted in his hole—he down-plays the discussions or says he didn't remember them.

Judge Nixon is right about one thing: the conversations did not amount to much in the end. Drew Fairchild eventually served time in prison for his drug smuggling. He was not spared because of Judge Nixon. But, of course, that's not the issue. We're here to decide whether Judge Nixon made false or misleading statements about his own actions. My conclusion is, he did.

I think so for a number of reasons. First, Judge Nixon's statements were adamant. They were not hedging, like "gee, I might have talked about Drew's case, but I don't think so." No, in the grand jury, Judge Nixon denied any discussions in flat terms. He said he had "nothing whatsoever" to do with Drew Fairchild's case. He said he "never talked to anyone about the case." This from a man who later claimed he spoke to Wiley Fairchild twice about an aspect of the case—blackmail. This from a man who later said he spoke to Bud Holmes about "a matter that you're handling concerning Mr. Fairchild's son."

Now Judge Nixon chooses his words carefully. Everyone who knows him says so. He's a Federal judge. He's observed hundreds of witnesses; he knows how these things work. Yet, before the grand jury, he did not qualify his denials. I think that reveals his intent.

Judge Nixon suggests he was surprised at the first interview, and he complains that he was not asked the right questions. But even if we give him the benefit of the doubt on these points, he had weeks to get his thoughts together before testifying to the grand jury. He knew what was coming. He read about the grand jury in the papers. He hired an attorney. He reviewed a transcript of his first interview. Don't you think he would have racked his brain for every detail? This is a lawyer, after all, a former litigator.

In the grand jury room, Judge Nixon declared that he had nothing to do with Drew Fairchild's case "officially or unofficially." the "official" part is certainly true. But by his own admission, he at least played an unofficial role in communicating Wiley Fairchild's blackmail allegations to Bud Holmes. And no matter how hard Judge Nixon tries to play with words, those communications involved the *Drew Fairchild* case. I'm not persuaded by the claim that Judge Nixon "mentioned" Drew's case to Bud Holmes but somehow didn't "discuss" it.

Judge Nixon says no one—not Fairchild, Ingram, or Holmes—told the grand jury about the judge's conversations with Holmes or Fairchild, or about the phone call from the farm. Thus, Judge Nixon contends that he is being held to an unfair standard of "testimonial perfection."

However, this argument does not wash. It's easy to understand why Holmes did not bring up the discussions. He'd done some very bad things, like passing Drew's case to the inactive file—after Drew pleaded guilty—to make Judge Nixon look good to Wiley Fairchild. For his part, Carroll Ingram did not tell the grand jury about the phone call because he learned about it only later. Only after Ingram testified did Holmes tell Ingram about the phone call. Ingram subsequently volunteered this new information to the Justice Department.

As for Wiley Fairchild—well, I frankly cannot explain his lapse. But since when do two wrongs make a right? More importantly, Wiley is not the one who's on trial here, and Wiley is not a Federal judge.

I do not mean to suggest that this is an open-and-shut case. One might argue, as Judge Nixon does, that his false statements were not material. In other words, if all Judge Nixon did was talk about blackmail to Wiley Fairchild and Bud Holmes, then his misleading testimony to the grand jury was no big deal—since there never was a blackmail. And one who accepts the Holmes version of events could nevertheless argue that Judge Nixon did no harm by denying that Holmes had discussed the case with him—since their discussion was not itself illegal.

But Judge Nixon took an oath to tell the truth and the whole truth. As a grand jury witness, it was not for him to decide what would be material. That was for the grand jury to decide. Of all people, Federal Judge Walter Nixon certainly knew this.

So I am going to vote "guilty" on articles I and II. Judge Nixon lied to the grand jury. He misled the grand jury. These acts are indisputably criminal and warrant impeachment. I do not buy the argument that he forgot. It's just not plausible. Nor do I accept the claim that all of the prosecution witnesses are mistaken or lying themselves. On the important points, their stories are consistent. Finally, none of the side issues—like overreaching by Prosecutor Weingarten—rises to the level of exonerating Judge Nixon. On articles I and II, the House proved its case by clear and convincing evidence.

Yesterday, Judge Nixon's lawyer, Mr. Stewart, said something that remains in my mind. He said the prosecution witnesses became "hostages to their own lies." But I think his phrase really describes Judge Nixon. He became a hostage to his own misleading statements. It's tragic that he ended up that way; and I am saddened that we're here. Nevertheless, the evidence presented to the Senate demands Judge Nixon's removal from office. He is guilty on articles I and II. Article III should be dismissed for the reasons I have stated.

STATEMENT OF SENATOR JAMES M. JEFFORDS

(From the Congressional Record—Senate, November 3, 1989)

INTRODUCTION

Mr. JEFFORDS. Mr. President, the analysis of this matter must start with the realization that it is factually a far more complex case than the prior perjury conviction and resulting incarceration of Judge Nixon could easily lead one to believe. Mere reliance by the Senate on the determination of the jury in his criminal trial would constitute an abdication of the solemn obligations placed upon us by the Constitution. Rather, we are charged to examine the facts independently and make our own determinations as to whether the conduct of this Federal judge was such that his removal from office is required. I find that such removal is mandated by the proven facts.

THE ARTICLES

The articles of impeachment charge Judge Nixon with knowingly making false or misleading statements, first to Justice Department officials and the FBI during an interview in his chambers, and later during sworn testimony before a grand jury investigation. First, the judge's financial relationship with Wiley Fairchild; and second, the peculiar handling of the State criminal prosecution of Wiley's son Drew Fairchild for drug smuggling.

Impeachment article I charges that the judge's statement to the grand jury on July 18, 1984, that Forrest County District Attorney Paul "Bud" Holmes never discussed the *Drew Fairchild* case with him was materially false or misleading in that such a discussion had taken place. Judge Nixon was convicted of perjury for this statement.

Impeachment article II alleges that the judge's testimony before the grand jury on July 18, 1984 that he had nothing to do with

Drew's case and that he "never handled any part of it, never had a thing to do with it at all, and never talked to anyone, State or Federal, prosecutor or judge, that in any way influenced anybody" with respect to the *Drew Fairchild* case was also false or misleading. Judge Nixon was also convicted for perjury based on this statement.

Impeachment article III alleges that Judge Nixon has raised substantial doubt as to his judicial integrity, violated the public trust and generally brought disrepute upon the judiciary by uttering 14 false statements during the Justice Department interview and grand jury testimony. The two false statements alleged in article I are repeated in this article as part of the judge's design to conceal his conversations with Wiley Fairchild, Carroll Ingram and Paul "Bud" Holmes regarding the *Drew Fairchild* drug smuggling case.

ANALYSIS

Reduced to their basics, the allegations against Judge Nixon are that, while under oath to tell the truth and against his oath of office, he lied about having conversations with several persons regarding the State court drug smuggling case against Drew Fairchild. Judge Nixon does not deny that the conversations did take place or that he was a participant. Rather, his defenses are: First, that at the times he was questioned he had no recollection or recall of these insignificant conversations and/or second, that he gave narrow, but technically truthful responses to the questions put to him on these occasions.

The House points out that the "no recollection" defense is raised for the first time before the Senate. In the prior proceedings on this matter only the "technically true" defense had been asserted. In fact, the House notes that in his prior sworn testimony Judge Nixon specifically stated that he was aware of the conversations when he was answering the grand jury's questions. Thus, they urge the discrediting of Judge Nixon on this point, if for no reason other than his inconsistency. I agree. Obviously, the adoption of an entirely new tact at this late date does nothing to enhance the judge's credibility. Further, given the known facts, any questioning, no matter how general, should have triggered his recollection of these conversations and he should have revealed them to the grand jury and the Justice Department officials. Any other conclusion is simply untenable.

A similar factor working against the judge's credibility is the inconsistency of his testimony regarding the date on which the critical conversations took place. At his criminal trial, Judge Nixon testified that he was positive that he had not been in Hattiesburg at all on May 14, 1982. Thus he argued that the conversations could not have occurred that day and must have been on March 11, 1983, as he proposed. However, records produced after the criminal trial reveal that Judge Nixon was in fact in Hattiesburg on May 14 to visit his dentist. Before the Impeachment Trial Committee the judge explained this discrepancy by stating that his criminal trial testimony had been "an honest mistake."

However, my rejection of this element of Judge Nixon's defense has at least one other basis. By his own account, the subject conversations were called to Judge Nixon's mind by Bud Holmes during a parking lot meeting with him in February 1985. At that time Judge Nixon had not yet been indicted (he would not be until the following August) and the grand jury was still sitting. Accepting for the moment that he did not connect the conversations to the topic of the grand jury investigation until that point, why did he not come forward to clear up any remaining confusion about the issue? He could have returned to the grand jury and offered exculpatory testimony. He could have held his own press conference to bring this matter to full and final light. He took neither these nor any other actions, but rather chose to sit back and allow the grand jury to proceed on the basis (from his perspective) of erroneous facts. The direct results of this choice have been his criminal conviction, incarceration and now impeachment.

For my part I cannot fathom why someone in Judge Nixon's asserted position would fail to come forward. He states that he was completely innocent, his conversations and actions having been entirely appropriate. He had supervised numerous grand juries and thus was fully aware of the broad nature of the investigations which they conduct. He was charged on a daily basis with enforcement of the primary tenet of American criminal justice, that a person is innocent until proven guilty. Did he lack faith in the system when he, rather than another, was the potential accused? Why would he choose not to supply accurate information which would aid the grand jury in reaching a correct conclusion in its investigation?

Judge Nixon has no response to these questions which is satisfactory to me. He first asserts that he would have returned and testified openly had the grand jury recalled him. However, there was no reason for the grand jury to think that he had anything to say in addition to what he had previously testified. The onus clearly was on him to change the status quo created by his prior sworn testimony. His excuse for not taking that step is that the grand jury was out to get him (he was the prize) and any additional testimony only would have been used against him. However, the basis for his perjury convictions was already in place based on his earlier testimony. He could only have made his situation better, not worse, by clearing up the confusion regarding whether the conversations took place and whether there was anything improper about them. Given these facts, I can reach no other conclusion than that Judge Nixon was attempting to coverup something by his silence.

What did Judge Nixon have to hide? This question leads us back to the oil and gas deal with Wiley Fairchild. Judge Nixon was not convicted in connection with this deal, nor do the articles of impeachment include a charge based upon it. However, I agree with the House that the existence and nature of the deal forms the necessary background for understanding Judge Nixon's motivations.

From start to finish this was a sweetheart deal inherently unavailable to the public. Judge Nixon purchased from Wiley Fairchild interests in three oil wells, but he first, laid out none of his own money, second, received a loan from Fairchild at below market rate interest for the amount of the required down payment, third, paid off the loan only after receiving proceeds from the wells in amounts far exceeding his loan indebtedness, and fourth, offered to be of help to Fairchild if he ever could. Further, the deal was also inherently suspect on the issue of its timing. Even viewed most favorably to Judge Nixon, the facts establish that the deal was first discussed before the drug bust but not consummated until afterwards; and that when supporting documents were executed they were backdated. I am not aware, nor do I accept that backdating documents is appropriate legal procedure. All of these facts combined to create an overwhelming body of incriminating circumstantial background evidence.

The evidence does not conclusively establish that Judge Nixon believed there was anything improper about his deal with Fairchild or that he otherwise tried to hide its existence. However, Fairchild was charged with and plead guilty to making an unlawful gratuity for the deal. He obviously thought that something more than an arms-length transaction had taken place. I cannot believe Judge Nixon was so naive that he did not recognize that there were strings attached to the deal, or at the very least that its terms were extremely suspect. Rather, I conclude that he was fully aware of the unusual nature of his investment and that it would readily lead any investigator looking into the situation to suspect that some impropriety had occurred. Revelation of the fact that the Judge, Holmes and Fairchild had discussed the drug case, no matter how innocent the discussions may have been, would only serve to confirm such suspicions. Thus, fear that his professional standing and reputation would be damaged, coupled with a desire to maintain and perhaps expand upon this very favorable relationship with Wiley Fairchild, were the predominant factors motivating Judge Nixon to conceal the conversations.

This conclusion brings me foresquare to Judge Nixon's second line of defense, that is, that his answers to the questions of the grand jury and the Justice Department officials were technically true. Unfortunately for the judge, I find this argument to be nothing more than a semantic shell game, which is totally dependent upon an overly minute parsing of the term "discussion" and which ignores the commonsense interpretation of the known facts. Judge Nixon would have us believe that although he knew of his business relationship with Wiley Fairchild, his close personal relationship with Bud Holmes and the conversations which he had with the two of them about Drew Fairchild's case (or at least about matters closely associated with Holmes' handling of that case), his response that he had never "discussed the case" with anyone was technically true.

By no stretch of the imagination can I accept this position. Rather, I must conclude that these responses were clearly false and misleading as charged by the House. Further, as discussed above, I reject Judge Nixon's argument that he simply did not recall the conversations at the time he was being questioned. Thus, my guilty votes on articles I and III are based on the conclusions that Judge Nixon did have discussions regarding the *Drew Fairchild* drug case, that he was aware of them when questioned by the grand jury and Justice Department investigator and that, by his denials and statements in response to these questions, he intended to conceal their existence.

As to article II, my vote of not guilty reflects the conclusions that Judge Nixon really did not intend to influence the handling of the *Drew Fairchild* case and that he in fact did not influence it. Applying the "clear and convincing" standard of proof, there simply was not sufficient evidence to establish either proposition. Thus, the midtrial modification of the article, which shifted the focus from whether Judge Nixon intended to influence Bud Holmes' handling of the case to whether he had any actual influence on the case, was immaterial to my determination.

This is undoubtedly a sad case. The oil and gas deals, which prompted the Justice Department investigation, while they were suspect and ill advised, were not proven to be unlawful. Further, the conversations or discussions which Judge Nixon had with Holmes and Fairchild were relatively innocent and not connected in any meaningful way to the business deals. This matter would not be before us but for Judge Nixon's choice to obstruct the ability of the investigators to look for connections between these two events by lying about whether the conversations took place. It is only the lies which have caused his demise. While sad, I submit that there was no other possible outcome, for a judge who has demonstrated complete disregard for the sanctity of his oath is no longer fit to administer and enforce the oaths of others.

STATEMENT OF SENATOR BOB DOLE

Mr. President, last week the Senate removed Walter L. Nixon, Jr. from his office as a Federal District Court Judge in the Southern District of Mississippi.

I was one of the 89 Senators who voted to convict Judge Nixon under article I of the articles of impeachment. Nevertheless, I also voted to acquit Judge Nixon under articles II and III.

ARTICLE I

Article I alleges that Judge Nixon lied to a Federal grand jury when he stated that Forrest County District Attorney Paul Holmes never discussed the *Drew Fairchild* case with him. In response to this charge, Judge Nixon contended that this statement was literally true, because he raised with Holmes only the blackmail allegation concerning the handling of Drew Fairchild's case and stopped Holmes from telling him anything about the substance of the case. Judge Nixon also contended that, at the time of his grand jury testimony, he was simply unable to "recall" his discussions with Holmes about the *Drew Fairchild* case.

I cannot accept Judge Nixon's explanation that the grand jury's questions triggered his recollection of the blackmail allegations made by Wiley Fairchild, but that these questions did not trigger his recollection of the *Drew Fairchild* case itself. This explanation is facile, it is cleverly constructed, but it also lacks any trace of believability.

I also cannot believe that Judge Nixon somehow could not "recall" the fact that Holmes had discussed the substance of the *Drew Fairchild* case with him, particularly after being questioned about these discussions three months earlier by the FBI. This explanation simply defies our common experience. While many of us have suffered the embarrassment of having often important factual information "slip our minds" at crucial moments, I cannot believe that Judge Nixon would suddenly forget about his conversations with Paul Holmes, before a grand jury that was specifically empanelled to investigate charges of corruption involving Judge Nixon himself. Judge Nixon knew the purpose of the grand jury, he knew that the grand jury was concerned about the passing of the *Drew Fairchild* case to the files, and he knew that the stakes were high, so high that he felt compelled to lie in order to cover up his own improprieties.

My decision to convict Judge Nixon under article I, therefore, turned on an evaluation of Judge Nixon's own credibility, and not on the credibility of Paul Holmes, Wiley Fairchild, Carrol Ingram, or any other witness. I listened carefully to the remarks of Judge Nixon before the Senate. At times, these remarks were very poignant. But unfortunately, Judge Nixon and his words failed to have the ring of truth.

ARTICLE II

Article II alleges that Judge Nixon lied to a Federal grand jury when he stated that "he had nothing whatsoever to do with the *Drew Fairchild* case" and that he "never handled any part of it, never had a thing to do with it at all, and never talked to anyone, State or Federal, prosecutor or judge, that in any way influenced anybody" with respect to the *Drew Fairchild* case.

I voted to acquit Judge Nixon under article II because the House managers were simply unable to prove that Judge Nixon had, in fact, "influenced anybody" in a way that had a significant effect on the disposition of the *Drew Fairchild* case. The House managers also failed to prove—at least to my satisfaction—that Judge Nixon himself *knew* that he had acted in a way that "influenced anybody" with respect to the handling of the case.

ARTICLE III: THE "OMNIBUS" ARTICLE

I voted to support Judge Nixon's motion to dismiss article III, the so-called "omnibus" article. As a result, I voted to acquit Judge Nixon of the charges contained in article III.

The allegations contained in article III may indeed be true. In my judgment, for example, Judge Nixon did in fact testify falsely before a Federal grand jury on July 18, 1984. This false testimony constitutes one of the many allegations contained in article III.

But Judge Nixon and his attorneys are right: Article III is redundant, complex, and unnecessarily confusing. It repeats the allegations contained in articles I and II. It alleges that Judge Nixon committed five different offenses in connection with each of fourteen separate events, a total of seventy charges. And it is drafted in such an excessively complicated way that it requires a linguistics expert to parse through the jungle of mangled syntax.

For these reasons, I believe that it was virtually impossible for Judge Nixon and his attorneys to prepare an adequate defense to the charges contained in article III.

In future impeachment proceedings, I would urge the House of Representatives to resist the temptation of drafting an "omnibus" article. If the House is unable to win a conviction under any of those articles that allege specific and discreet impeachable offenses, it should not then have the opportunity to seek a conviction under an "omnibus" article that simply recites the charges contained in the previous articles. Giving the House two bites of the same apple is simply unfair to the subject of an impeachment proceeding.

THE OBLIGATIONS OF FEDERAL JUDGES

Mr. President, article III of the constitution gives to Federal judges the privilege of lifetime tenure. In their wisdom, the framers believed that lifetime tenure was absolutely essential to insulate the Federal judiciary from the normal pressures that flow from the political process.

But the privilege of lifetime tenure carries with it some very important obligations. Federal judges must adhere to the highest ethical and moral standards. And they must avoid even the slightest appearance of impropriety.

Mr. President, I personally sympathize with Judge Nixon and his family. I do not believe that Judge Nixon is a malevolent man. And I have little doubt that Judge Nixon was a capable member of the Federal Judiciary during his twenty years of service.

But the simple truth is that Judge Nixon failed to live up to the solemn obligations that accompany lifetime tenure. He failed to tell the truth under oath, and accordingly, forfeited the privilege of serving his country as a member of the Federal bench.

SPECIAL THANKS TO THE IMPEACHMENT COMMITTEE

Finally, I would like to thank Senators Fowler, Danforth, and the other Members of the impeachment committee, for the fine work performed by the committee during the past few months. It was yeoman's duty—but a very important duty—and this Senator appreciates the service that the committee Members have provided us all.

STATEMENT OF SENATOR JOSEPH R. BIDEN, JR.

(From the Congressional Record—Senate, November 15, 1989)

Mr. BIDEN. Mr. President, the House of Representatives exhibited three articles of impeachment against Judge Walter L. Nixon, Jr. Articles I and II each alleged a single, discrete false statement before a grand jury. Article III, the so-called omnibus article, alleged that Judge Nixon deliberately concealed certain conversations by knowingly making one or more false statements before the grand jury and one or more false statements in an interview with Federal investigators.

I voted to convict Judge Nixon on articles I and II, and to acquit Judge Nixon on article III. In addition, I voted in favor of granting Judge Nixon's motion to dismiss article III. I make this statement to briefly explain the reasons for my votes on article III.

First, article III cumulated 14 alleged false statements in such a way as to effectively bypass the requirement in article I, section 3, clause 6 of the Constitution that "no Person shall be convicted without the concurrence of two thirds of the Members present." In order to convict under article III, it was necessary to find only that Judge Nixon made one or more false statements to the grand jury and one or more false statements to the Federal investigators. It was possible, therefore, for Judge Nixon to be convicted under article III even though two-thirds of the Members present did not agree that he made any one of the alleged false statements. Put another way, Judge Nixon could have been convicted on article III even though he would have been acquitted were each of the 14 alleged false statements voted on separately. This, in my view, the Constitution forbids.

Second, article III unfairly repeated the alleged false statements in articles I and II. It was clear from the language of article III that Judge Nixon could have been acquitted on articles I and II but then convicted on article III—on the basis of the very same facts that were the foundation of articles I and II. Subsection II(A), (D), (E), (F), and (G) alleged essentially the same facts that were alleged in articles I and II. In my view, Judge Nixon should not have been subject to liability for the allegations in those subsections of article III were he to have been acquitted on articles I and II.

STATEMENT OF SENATOR FRANK H. MURKOWSKI

(From the Congressional Record—Senate, November 21, 1989)

Mr. MURKOWSKI. Mr. President, I think most of my colleagues will agree that our impeachment committee report, and the persuasive presentation by Judge Nixon and his counsel, show that this case is much more difficult than it might have first appeared.

We also have the sobering reality of the actions and decisions of others before us who have viewed much of the same evidence we have gone through. Other people have:

Convicted Judge Nixon of lying to the Government and to the grand jury;

Denied Judge Nixon relief in two rounds of appeals, including one to the U.S. Supreme Court;

And we also know that the House voted unanimously to impeach the judge.

But, I think we have to begin our deliberation without regard for the jury and appeal verdicts against Judge Nixon. The Senate is not a rubber stamp in cases of impeachment. In fact of the 14 impeachment trials in the Senate, the Senate has refused to convict 8 times. We look at the evidence freshly and each of us must determine if Judge Nixon is fit to continue serving on the bench.

Despite years of litigation, key facts are still in dispute. For example, was the important phone call made from Budd Holmes' farm in May 1982, as the House contends, or was it in March 1983, as Judge Nixon asserts?

The cast of characters in this case also poses serious problems of credibility:

Wiley Fairchild, the 77-year-old Hattiesburg businessman at the heart of this controversy, has failing memory and has given various versions of the facts since 1984.

Bud Holmes, the former State district attorney who also testified against Judge Nixon, has given so many versions of certain facts that he suggested the Senate panel could chose whichever ones we felt comfortable with.

Judge Walter Nixon also presents a dilemma to this Senator. Witnesses testified uniformly that Judge Nixon has been an outstanding Federal judge, who presided over one of the busiest dockets in the country. He has made difficult, often unpopular decisions in Mississippi, including the desegregation of the Mississippi State Police. In the early 1980's, he was considered for elevation to the Federal Circuit Court of Appeals.

Moreover, I had the chance to observe Judge Nixon as he testified. He seemed to be a decent, civil man, perhaps more so than those who testified against him.

Another concern with this case is the obvious aggressiveness of the Department of Justice. There is indication that the Washington, DC, prosecutor sought to convict Judge Nixon at all costs. He lost on the main charge that Nixon accepted an unlawful gratuity, but he convinced the jury that Judge Nixon failed to tell the grand jury the full truth.

However, by raising this point, I do not suggest that Judge Nixon has proven a case of prosecutorial misconduct. I'm not sure I appreciate the aggressiveness of the prosecutor in this case, nor do I appreciate certain tactics employed in the investigation, such as surprising witnesses before the grand jury with documents that were requested but not provided before their appearance. But proof is lacking that the prosecutor manufactured evidence against Judge Nixon, or encouraged witnesses to testify falsely against him at trial.

As a member of the impeachment panel, I will highlight two areas that have made an impact on me:

The financial relationship between Wiley Fairchild and Judge Nixon.

Judge Nixon's failure to correct the grand jury record once he realized the truth about, or remembered, the Holmes' farm telephone call.

Regarding the first matter, it is absolutely clear that Judge Nixon's investment in an oil and gas deal with Wiley Fairchild was designed to benefit both men.

Judge Nixon needed money to support his family and to pay for the education of his learning disabled son. He wanted to invest with Wiley Fairchild, the wealthiest person in Hattiesburg, Ms. Fairchild had extensive oil and gas investments. Judge Nixon had no particular relationship with Fairchild at the time, and called on Caroll Ingram to help him make contact. Ingram was a distant relative of Fairchild, and represented him as a lawyer off and on. Judge Nixon pursued the matter until Ingram finally arranged a meeting with Fairchild in 1979, at which Fairchild agreed to find some oil properties for the judge.

Months passed, and eventually Fairchild selected three wells for which Judge Nixon was to invest $9,500.

The judge signed three promissory notes to Fairchild Industries, at 10 percent interest, for the $9,500. The evidence also shows that

Judge Nixon did not actually pay the notes or the interest until substantial royalties began flowing from the wells.

In short, the judge had no actual cash outlay in making the investment with Wiley Fairchild.

The investment has yielded over $73,000 to date for Judge Nixon.

Why would Wiley Fairchild offer such an investment to Judge Nixon, who, in 1979, was a stranger? How did he benefit?

Wiley liked to be close to high public officials in Mississippi. Walter Nixon was a prominent judge, and Wiley wanted the judge to be in his orbit of influential and important official friends. Because of this, Wiley would make sure that Judge Nixon's investment was not all that risky. He personally selected the three wells, and also testified that he could have gotten between $16,500 and $18,500 more for these investments than the $9,500 that the judge was asked to pay.

Judge Nixon's investment with Fairchild was so lucrative, and the financing arrangements were so beneficial to the judge, that it formed the basis of the Government's initial investigation into Judge Nixon's activities.

By outlining the investment between Fairchild and Judge Nixon, I do not suggest that it was illegal. The House did not impeach the judge for the financial transaction. And, as noted earlier, the jury acquitted him of taking an illegal gratuity.

But, the investment was unusual, and it left the judge open to exploitation to say the least.

After April 1984, the time of the first interview with the Government prosecutor and the FBI, Judge Nixon had to know that there were a lot of unanswered questions about the specifics of the investment and his relationship with Wiley Fairchild.

Therefore, after his initial contact with the Department of Justice, Judge Nixon would want his relationship with Fairchild to have all the appearances of an arm's length transaction.

For 3 months, from April to July 1984, Judge Nixon must have reviewed all possible facts surrounding his investment with Fairchild, and any contacts he might have had relating to *Drew Fairchild's* case.

In fact, the testimony before our impeachment panel shows that at the conclusion of the April 1984 interview with the Department of Justice, the judge told the Government that he was going to call Caroll Ingram and others to discuss the investment. He did so, and indicated concern that the Government was even asking questions about the investment.

Relating this information to the articles of impeachment, article I states that during the grand jury session in July 1984, Judge Nixon said that he and Bud Holmes never discussed the *Drew Fairchild* case.

Keep in mind that by the time the judge asked to appear before the grand jury in July 1984, he had months to think about the investment and facts surrounding his relationship with Wiley Fairchild. Between April and July 1984, it must have become clear to Judge Nixon that he had to convince the Government that the investment was proper, and that he never did anything by way of a favor for Wiley Fairchild.

To maintain this appearance, Judge Nixon would not have wanted the grand jury to learn that he had discussed Drew Fairchild's case with Bud Holmes at any time or for any reason. If the judge gave the grand jury any information that Wiley had asked Judge Nixon to help Drew, or that he had talked to Holmes, then the grand jury would have had even greater reason to suspect that the oil and gas deal was merely a bribe, or that Judge Nixon was indeed on Fairchild's payroll.

So, with regard to article I, Judge Nixon had the motive to say that he had never discussed Drew's case with Bud Holmes.

The key element of Judge Nixon's defense is that when he testified before the grand jury he simply did not bring to mind the three conversations that took place on one day with Wiley Fairchild and Bud Holmes. He says that those conversations were so unimportant and remote that they simply did not come into his mind.

Even though it's hard to imagine that between April and July 1984 Judge Nixon did not remember the farm phone call, or the "blackmail" discussion with Wiley Fairchild, in looking at article I, I will give Judge Nixon the benefit of the doubt.

However, eventually the judge's memory was refreshed by Bud Holmes.

Judge Nixon appeared before the grand jury in July 1984. Months later, in February 1985, Judge Nixon had a meeting with Bud Holmes in the parking lot of the Hattiesburg Federal court building. Holmes told Judge Nixon that he had testified before the grand jury and had denied having made a telephone call to Wiley Fairchild about Drew's drug case. Holmes suggested to the judge that there had never been such a call, but Judge Nixon told Holmes there had been a call, and that there had been nothing improper about the call.

Because of this February 1985 meeting with Holmes, Judge Nixon's memory of the farm phone call was jogged for the first time, according to the judge.

Yet, when Judge Nixon recalled the conversations, he made no attempt to contact the Government, or to return to the grand jury to correct his earlier statements that he had absolutely no discussion with Bud Holmes about Drew's case.

Why didn't the judge take action to correct the record?

Judge Nixon testified that he and his lawyer thought about this, but by that time there was a "Gestapo" type atmosphere surrounding the grand jury proceeding, there was adverse publicity in Hattiesburg, and Judge Nixon felt he would not get a fair hearing. He and his lawyer decided not to pursue the matter before the grand jury since by then Judge Nixon was a target of the prosecution.

Hindsight is not only cheap, but it is always 20/20. None of us can fully understand the atmosphere that surrounded Judge Nixon at the time. However, it is hard to ignore the following:

The conversation from the farm, or in Wiley Fairchild's office earlier that day, were not in themselves illegal acts. Yet Judge Nixon knew that he had made a categorical assertion under oath before the grand jury that he had nothing whatsoever to do with Drew Fairchild's case, and had never discussed it with Bud Holmes.

When the judge learned that this wasn't entirely true, he had to know, as a long-time lawyer and judge, that the categorical assertion exposed him to the charge of misleading the grand jury, or even perjury.

By his failure to try to correct the record, it is difficult to escape the conclusion that Judge Nixon intentionally concealed the facts from the grand jury. He had the opportunity to let the Government know about the farm conversation, and he made the choice, with his lawyer, not to do so.

I understand fully his defense attorney's argument that no lawyer would advise the target of a criminal investigation to return voluntarily to a hostile grand jury.

However, a U.S. district judge is not an ordinary grand jury target. He had voluntarily asked to testify the first time in July 1984 and I am convinced that he had a high duty to correct any factual errors that might have arisen from his first appearance.

I have also considered Judge Nixon's alternative defense: that even if he did have conversations with Bud Holmes, they had no impact on Drew's case, and they did not influence the handling of the case by Bud Holmes. He also disputes whether casual conversations rise to the level of "discussion" about Drew's case. But these defenses appear to be illogical, for the following reasons:

In the tense atmosphere of his grand jury appearance, did the judge seriously and consciously choose not to mention the farm conversation and phone call because he paused and drew a careful, lawyerly distinction in his own mind between a mere "conversation" and a "discussion"?

And did he fail to mention the farm conversation because he knew that it did not actually influence the outcome of Drew Fairchild's drug case? Again, it's hard to imagine that the judge, in the heated environment of the grand jury room, carefully contemplated the distinction between a conversation that influenced the outcome of a case, and a conversation that merely related to a case.

These alternative defenses now seem like convenient distinctions to draw in 1989, but they don't square with Judge Nixon's testimony before our impeachment panel that the farm telephone call simply didn't come into his memory when he testified before the grand jury. I don't believe the judge can have it both ways. The alternatives defenses have not been persuasive.

Of greater weight to this Senator is the fact that the judge made a conscious decision not to correct his grand jury testimony when he learned the truth. By not doing so, he knew he had mislead the grand jury and had concealed the conversations with Bud Holmes.

Article II states that Judge Nixon mislead the grand jury when he said he never did anything or talked to anyone that influenced the handling of the *Drew Fairchild* case.

I am troubled by article II because it has been modified recently by the House only after the judge's actual statement before the grand jury was clarified during our deliberations.

I am not confident that the House of Representatives really focused on the difference in language when it readopted this article a week or so ago.

If the essence of the article is that the judge influenced the handling of the *Drew Fairchild* case, then the matter of passing Drew's case to the files becomes important.

We know that the case was passed to the files in December 1982. Yet, the evidence is entirely unclear as to when the farm conversations really took place. If, as Holmes says, they happened before December 1982, then the judge might have influenced Drew's case. But if the conversations took place in March 1983 after the case was passed to the files, then the conversations had no influence on anything.

I frankly don't know when the conversations took place.

Given this doubt in my mind about the date of the farm conversations, and given the change in language in the article by the House, I am not persuaded that the House has proven its case in article II.

Article III states or restates 14 instances when the judge allegedly didn't tell the full truth, 7 instances when the Justice Department interviewed him in April 1984, and 7 when he voluntarily appeared before the grand jury in July 1984.

I am inclined to reject article III.

First, I am not persuaded that the judge consciously chose to conceal facts when the Government first interviewed him in April 1984. The interview was unannounced, the judge didn't have time to investigate facts or to fully understand the line of questioning. I just don't believe it is proper to hold the judge to a standard of perfection of memory when he was first interviewed.

Second, I don't appreciate the omnibus nature of article III, and I agree with the argument that the article could easily be used to convict Judge Nixon by less than the super majority vote required by the Constitution.

In concluding my remarks, I note again that this is not an easy case. In many ways the witnesses have been contradictory, important facts are not resolved, and there are weaknesses to the House's case.

Regardless of the disputes, a few things are clear:

Judge Nixon did talk about Drew Fairchild's case with Bud Holmes.

While he may have had no recollection of the conversations when he was interviewed by the prosecutor, or when he voluntarily went before the grand jury, there is no dispute that Judge Nixon's recollection was refreshed by Bud Holmes after the grand jury appearance. Nevertheless, he didn't correct the record and he concealed the facts from the grand jury.

Judge Nixon's investment with Wiley Fairchild, the real subject of the Government's inquiry, was lucrative, and was hardly arm's length.

Taking these facts into consideration, and even giving Judge Nixon the benefit of the doubt on many disputed issues, I am persuaded that he mislead the grand jury and concealed conversations he had with Bud Holmes. He did so, I believe, because he needed to persuade the Government that his investment with Fairchild was arm's length and had no improper taint.

This is a close question, but I believe that Judge Nixon's omissions and conduct warrant his removal from the bench.

As one of the most important decision makers in our Federal system, a Federal district court judge simply must meet the highest possible ethical and legal standards in our system of justice. If he conceals facts during the course of a formal investigation, he has not met this high burden.

I have not looked forward to voting to convict Judge Walter Nixon on article I. I am not unaware that he still enjoys strong support from members of the bar in Mississippi. I have read the letters of support he has received, including those from his family members.

None of us should relish this task. But I am convinced that Judge Nixon no longer possesses those high qualities of integrity that we must demand in our Federal judges.

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